(25,742)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 912.

CORN PRODUCTS REFINING COMPANY, PLAINTIFF IN ERROR,

vs.

V. C. EDDY, B. J. ALEXANDER, C. H. LERRIGO, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 6, 1917.

a In the Supreme Court of the State of Kansas.

No. 20280.

THE CORN PRODUCTS REFINING CO., Appellee,

vs.

V. C. EDDY et al., Appellants.

Be it remembered, That on the 26th day of July, 1915, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, appeal papers, consisting of a certified copy of Notice of Appeal and Proof of Service thereof, and a certified copy of Journal Entry of Judgment appealed from, which notice of appeal, proof of service, and journal entry of judgment, are in words and figures as follows, to-wit:

b Filed Jul- 26, 1915. D. A. Valentine, Clerk Supreme Court.

In the District Court of Shawnee County, State of Kansas.

No. 28065.

THE CORN PRODUCTS REFINING COMPANY, Plaintiff,

vs.

V. C. EDDY et al., Defendants.

Notice of Appeal.

To said Plaintiff and to Blair, Magaw & Lillard, its Attorneys of Record:

You, and each of you, are hereby notified that the defendants in the above entitled case, and each of them, appeal to the Supreme Court of the State of Kansas from the judgment rendered by the Court in the above entitled cause and from the order therein overruling the motion of defendants for a new trial.

S. M. BREWSTER,
Attorney General;
J. L. HUNT,
Assistant Attorney General,
Attorneys for Defendants.

Service of the foregoing Notice is hereby acknowledged this 23rd day of July 1915.

BLAIR, MAGAW & LILLARD,
Attorneys for Plaintiff.

Endorsements: No. 28065. In the Shawnee Co. Dist. Court, State of Kansas. The Corn Products Refining Company, Plaintiff vs. V. C. Eddy et al., Defendants. Notice of Appeal. S. M. Brewster, John L. Hunt, Attorneys for defendants. Filed July 23, 1915. C. W. Bower, Clerk Dist. Court.

c STATE OF KANSAS,
Shawnee County, ss:

L. G. Seacat of lawful age, being first duly sworn, upon oath states:

That he served the foregoing notice on behalf of said defendants by delivering a true copy thereof to C. A. Magaw, one of the firm of Blair, Magaw & Lillard, attorneys for plaintiff.

L. G. SEACAT.

Subscribed and sworn to before me this 23 day of July, 1915.
[SEAL.]
C. W. BOWER,
Clerk Dist. Court.

d Whereas, Be It Remembered, That on the 10th day of July, 1915, in the Shawnee County District Court, Third Judicial District, State of Kansas, before the Honorable George H. Whitcomb, presiding Judge of the Second Division, it being at the April, 1915, term of said Court, the following proceedings among others, were had to-wit:

Second Division.

No. 28065.

CORN PRODUCTS REFINING COMPANY, Plaintiff,

vs.

V. C. EDDY, B. J. ALEXANDER, C. H. LERRIGO, CLAY E. COBURN, W. O. Thompson, O. D. Walker, J. S. Cummings, Jessie Thompson Orr, Walter D. Hunt, C. D. Welch, and S. J. Crumbine, Defendants.

Now on this 10th day of July, 1915, the same being one of the regular days of the April, 1915 term of this court, this cause having been heretofore submitted to the court and taken under advisement, came on for decision. The plaintiff appeared by its attorneys, Blair, Magaw & Lillard, and the defendants appeared by their attorney, John L. Hunt.

Thereupon the court being now fully advised in the premises finds for the plaintiff and against the defendants, that all of the allegations of plaintiff's petition are true.

It is therefore considered, ordered and adjudged by the court that the said defendants and each of them, their agents and employes and their successors and deputies, and the defendant S. J. Crumbine,

be forever enjoined from in any way interfering with the sale of Mary Jane in the state of Kansas upon the ground and for the reason that the same is misbranded when sold under the label referred to in plaintiff's petition, and that they be forever enjoined from notifying the plaintiff's customers or other persons
e within the state of Kansas or elsewhere that the said Mary Jane is misbranded when the label referred to in plaintiff's petition is attached to the cans, and that they be further enjoined from attempting to compel the plaintiff to label the same Mary Jane "A Compound," and from threatening to or taking any steps whatever to intimidate the plaintiff's customers or other persons dealing in or selling the said Mary Jane Syrup, so branded, within the state of Kansas, because of Regulation 6, and that plaintiff recover its costs herein taxed at $—.

GEORGE H. WHITCOMB, *Judge.*

O. K.
BLAIR, MAGAW & LILLARD,
Attorneys for Plaintiff.
J. L. HUNT,
Attorney for Defendant-.

f Whereas, be it remembered, that on the 17th day of July, 1915, in the Shawnee County District Court, Third Judicial District, State of Kansas, before the Honorable George H. Whitcomb, presiding Judge of the Second Division, it being at the April, 1915, term of said Court, the following proceedings among others, were had to-wit:

Second Division.

No. 28065.

CORN PRODUCTS REFINING COMPANY, Plaintiff,

vs.

V. C. EDDY, B. J. ALEXANDER, C. H. LERRIGO, CLAY E. COBURN, W. O. Thompson, O. D. Walker, S. J. Crumbine, J. S. Cummings, Jessie Thomas Orr, Walter D. Hunt, and C. D. Welch, Defendants.

Now on this 17th day of July, 1915, the same being one of the regular days of the April, 1915 term of this court, this cause came regularly on for hearing on the motion of the defendants for a new trial; the plaintiff appeared by its attorneys, Blair, Magaw & Lillard, and the defendants appeared by their attorney, John L. Hunt; thereupon the court after hearing the arguments of counsel and being fully advised in the premises finds that said motion should be overruled.

It is therefore considered, ordered and adjudged by the court that the defendants' motion for a new trial in the above entitled

action be and the same is hereby overruled, to which ruling and decision of the court the defendants at the time duly excepted.

GEORGE H. WHITCOMB, *Judge.*

g *Certificate.*

STATE OF KANSAS,
Shawnee County, ss:

I, C. W. Bower, Clerk of the District Court within and for the County and State *of* aforesaid, do hereby certify that the above and foregoing is a full, true and correct copy of

Notice of Appeal, Acknowledgement of Service of Notice of Appeal, Journal Entry of Judgment and Order overruling Motion for a New Trial.

in the above entitled cause, as the same appears on File and of record in my office.

Witness my hand and the seal of said court, hereunto affixed at my office in the city of Topeka, this 24 day of July, A. D. 1915.

[SEAL.] C. W. BOWER, *Clerk,*
By MARGARET A. SCHMIDT,
Deputy Clerk.

Endorsed: No. 20280. Corn Products Refining Co., Appellee, vs. V. C. Eddy et al., Appellants. Notice of Appeal and Transcript. Filed Jul- 26, 1915. D. A. Valentine, Clerk Supreme Court.

h Be it further remembered, that afterwards, on the 8th day of April, 1916, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, an abstract of the record, prepared by appellant, which abstract of the record is in the words and figures as follows, to-wit:

1 Filed Apr. 8, 1916. D. A. Valentine, Clerk Supreme Court.

In the Supreme Court of the State of Kansas.

No. 20280.

CORN PRODUCTS REFINING COMPANY, Appellee,

vs.

V. C. EDDY, B. J. ALEXANDER, C. H. LERRIGO, CLAY E. COBURN, W. O. Thompson, O. D. Walker, J. S. Cummings, Jessie Thomas Orr, Walter D. Hunt, C. D Welch, and S. J. Crumbine, Appellants.

Appeal from the District Court of Shawnee County, Kansas, Second Division.

Geo. H. Whitcomb, Judge.

ABSTRACT OF RECORD.

S. M. Brewster, Attorney General; S. N. Hawkes, Assistant Attorney General; J. L. Hunt, Assistant Attorney General, Attorneys for Defendants.

2 In the Supreme Court of the State of Kansas.

No. 20280.

CORN PRODUCTS REFINING COMPANY, Appellee,

vs.

V. C. EDDY, B. J. ALEXANDER, C. H. LERRIGO, CLAY E. COBURN, W. O. Thompson, O. D. Walker, J. S. Cummings, Jessie Thomas Orr, Walter D. Hunt, C. D Welch, and S. J. Crumbine, Appellants.

Specifications of Error.

Appellant avers that there is error in the record herein as follows:

1. The court below erred in overruling the motion of defendants below for a new trial.
2. The court below erred in entering judgment in favor of plaintiff below.
3. The court below erred in not entering judgment in favor of defendants below.
4. The court below erred in granting an injunction in favor of plaintiff below.

2½ ABSTRACT OF RECORD.

On the 2d day of May, 1913, plaintiff filed its petition herein, and on the 10th day of May filed its amended petition, in words and figures as follows, caption omitted:

Amended Petition.

First Cause of Action.

Now comes said plaintiff, Corn Products Refining Company, and for its first cause of action herein, alleges:

1. That it is now, and was at the time of the grievances herein complained of, a corporation, organized and existing under and by virtue of the laws of the state of New Jersey, with its chief office in New York City, New York; that the defendant, V. C. Eddy, is a citizen and resident of Thomas county, Kansas; B. J. Alexander is a citizen and resident of Brown county, Kansas; C. H. Lerrigo is a citizen and resident of Shawnee county, Kansas; Clay E. Coburn is a citizen and resident of Wyandotte county, Kansas; W. O. Thompson is a citizen and resident of Ford county, Kansas; O. D. Walker is a citizen and resident of Saline county, Kansas; J. S. Cummings is a citizen and resident of Allen county, Kansas; Jessie Thomas Orr is a citizen and resident of Johnson county, Kansas; Walter D. Hunt is a citizen and resident of Lyon county, Kansas; and C. D. Welch is a citizen and resident of Montgomery county, Kansas, and that the above named defendants are members of, and constitute, the Kansas State Board of Health; that they are hereinafter referred to as the Board of Health; that the defendant S. J. Crumbine is a citizen and resident of Shawnee county, Kansas, and is secretary of The Kansas State Board of Health, and is its executive officer; that the plaintiff is now, and has been for many years last past, engaged in Granite City, Illinois, in the manufacture of a proprietary syrup, which is known as and sold under the firm name of "Mary Jane."

2. Plaintiff further alleges that it has necessarily invested and actually employed, in its said business of manufacturing said Mary Jane syrup and in creating and carrying on the same, and

3 in the erection and construction of buildings and plants, and the equipment thereof with machinery, fixtures and appliances, many thousands of dollars; that it uses annually in the manufacture of said Mary Jane syrup large quantities of corn, amounting in the aggregate to many million bushels, and that it produces many millions of pounds of said syrup annually, which is put in sealed cans, of a capacity of five pounds each, and that each can of said syrup is branded on the outside, by the plaintiff at its factory in Granite City, Illinois, with a label, upon which is printed in large and plain letters the following:

5 Pounds, Net Weight.

Mary Jane.

Reg. U. S. Pat. Off.

Mary Jane is guaranteed by Corn Products Refining Co. to comply with the Food and Drugs Act, June 30, 1906. Registered under serial number 2317.

Mary Jane, a table syrup prepared from corn syrup, molasses and pure country sorghum. Contains sulphur dioxide.

M'f'd by Corn Products Refining Co.

General Offices: New York, U. S. A.

3. That said Mary Jane syrup is a proprietary food product and is now, and always has been, sold under said distinctive name of "Mary Jane," which is not the name of any other article of food; that said Mary Jane syrup contains nothing deleterious or injurious to health, and that defendants do not claim that it contains any deleterious or injurious ingredients.

4. Plaintiff further alleges that the said Mary Jane syrup is palatable and remarkably rich in nutriment, and is as good an article of food as cane syrup or molasses; that its popularity has spread throughout the country, including the state of Kansas; that its desirability for domestic use is recognized by the public; that in addition to being remarkably rich in nutriment, it is cheap, and is sold to the people of the state of Kansas, and others, for domestic use at such low prices that it comes within the means of all classes, and has, to a large extent, taken the place of the more expensive syrups and molasses for domestic use; that the great popularity of said Mary Jane syrup, and its growing competition with cane and other syrups, has caused great antagonism towards it from many rival interests, and that
4 such interests are constantly attacking the plaintiff in the manufacture and sale of said syrup, for the purpose of destroying said industry and eliminating said competition.

5. Plaintiff further alleges that corn raising is one of the most important industries of the state of Kansas, and one of its greatest sources of wealth, and that the manufacture of corn into corn syrup creates a greater demand for corn and should have the enthusiastic support of the people of the state of Kansas, and that not only the interests of the plaintiff are involved in this litigation, but that the interests of the corn-producing people of the state, as well as the consumers of said syrup, are also involved.

6. Plaintiff further alleges that it has now, and for many years last past has had, agents and representatives employed in soliciting orders for said Mary Jane syrup from wholesale merchants in the state of Kansas, and in other states of the Union; that said representatives and agents call upon such wholesale merchants in the state of Kan-

sas, solicit and take orders for such a quantity of said Mary Jane as may be agreed upon, and that said orders are forwarded to the plaintiff at its factory in Granite City, Illinois; that all such orders are subject to the approval of the plaintiff in Granite City, Illinois; that plaintiff has not now, and never has had, a stock of said syrup in the state of Kansas, but that in all cases the said orders are filled by the plaintiff at its factory in Granite City, Illinois, by selecting the number of cans ordered from its stock in that place, and delivering them, packed in boxes, to carriers at Granite City, Illinois, duly consigned to the party specified in the order, and that such carriers duly transport said syrup and deliver it to the consignee in the state of Kansas, in the original sealed cans, with the original labels still attached thereto.

Plaintiff further alleges that its entire business in the state of Kansas is conducted in this manner.

7. That the name "Mary Jane" is a name well known to the public as the name of a syrup for domestic use, and that said name is protected under trademarks in the United States, and that plaintiff has been supplying, and but for the matters hereinafter complained of would continue to supply, said wholesalers, in the manner aforesaid, with large quantities of said syrup, and by so doing has enjoyed and would continue to enjoy a reasonable profit.

5 8. Plaintiff further alleges that the said Board of Health, pretending and assuming to act under authority of chapter 266 of the Kansas Session Laws of 1907, as amended by chapter 184 of the Laws of 1909, particularly section 3 thereof, has made and published certain rules and regulations, among which are the following:

Regulation 3.

Analyses. Section 4.

A. If it appears from examination or analysis that the provisions of the Kansas food and drugs law have been violated, the secretary of the State Board of Health shall give notice to the county attorney of the county where the sample was taken, as prescribed. The results of such examinations may be published in the Bulletin of the Kansas State Board of Health, at such times as the secretary of the State Board of Health may direct.

Regulation 4.

Publication. Section 5.

B. (*a*) When a judgment of the courts shall have been rendered there may be a publication of the findings of the examiner or analyst, together with the findings of the court.

(*b*) This publication may be made in the form of circulars, notices, or bulletins, as the secretary of the State Board of Health may direct.

(*c*) If appeal be taken from the judgment of the court before such application, notice of the appeal shall accompany the publication.

Regulation 6.

C. (*b*) Manufacturers of proprietary foods are required to state upon the label the names and percentages of the materials used, so far as is necessary to secure freedom from adulteration and misbranding: (1) In the case of syrups, the principal label shall state definitely, in conspicuous letters, the percentage of each ingredient, in the case of compounds, mixtures, imitations, or blends. When the name of the syrup includes the name of one or more of the ingredients, the preponderating ingredient shall be named first. * * *

9. Plaintiff further alleges that section 3 of chapter 266 of the Kansas Session Laws of 1907, as amended by chapter 184 of the Kansas Laws of 1909, hereinafter called the Kansas food and drugs
6 law, and that part of section 8 thereof which attempts to confer power on the Kansas State Board of Health to make rules and regulations (particularly as construed and interpreted by the defendants) are repugnant to, and in contravention of, section 1, article 2, of the constitution of the state of Kansas, and of section 2 of the bill of rights thereof, in that they delegate legislative power to the Kansas State Board of Health to make rules and regulations, the violation of which is declared by said law to be a misdemeanor, and which said rules and regulations, if valid, are in effect legislative enactments.

10. Plaintiff further alleges that said regulations 3, 4 and 6 are void, because The Kansas State Board of Health had no lawful power or authority to make the same.

11. Plaintiff further alleges that said regulations 3 and 4 are void for the further reason that they are repugnant to, and in conflict with, sections 4 and 5 of the Kansas food and drugs law, and sections 3 and 4 of the act of Congress of June 30, 1906, C. 3915 (34 Stat. 768), known as the federal food and drugs act.

12. Plaintiff further alleges that said regulation No. 6 is void for the further reason that it is repugnant to section 8 of the Kansas food and drugs law, which provides: "That an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases: First, in the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with the statement of the place where said article has been manufactured or produced"; and which further provides: "That nothing in this act shall be construed as requiring or compelling proprietors or manufacturers of proprietary foods, which contain no unwholesome ingredients, to disclose their trade formulas, except in so far as the provisions of this act, or the

rules and regulations of the State Board of Health, may require to secure freedom from adulteration or misbranding."

13. Plaintiff further alleges that said section 3 of the Kansas food and drugs law, and that part of section 8 thereof which attempts to confer power upon The Kansas State Board of Health to make
7 rules and regulations, and said regulations 3, 4 and 6 (particularly as construed by the defendants) are void for the further reason that they are repugnant to, and in conflict with, the act of Congress of June 30, 1906, C. 3915 (34 Stat. 768), hereinafter called the federal food and drugs act, and are especially repugnant to section 8 thereof, which contains the identical provision hereinbefore quoted from section 8 of the Kansas food and drugs law, with the exception that the words "or the rules and regulations of the State Board of Health" are omitted.

14. Plaintiff further alleges that, independently of the operation and effect of the federal food and drugs act, section 3 and that part of section 8, hereinbefore specified, of the Kansas food and drugs law, and said regulations 3, 4 and 6, particularly as interpreted and construed by the defendants, are void, for the further reason that they are in conflict with section 1 of article 14 of the amendments to the constitution of the United States, in that they deprive persons of property without due process of law, and deny to persons within the state of Kansas the equal protection of the laws, and in that, as construed by the Board of Health, and its executive officer, the defendant, S. J. Crumbine, the said Kansas laws and the said rules and regulations arbitrarily require manufacturers of proprietary foods, without compensation and without due process of law, whether such proprietary food contains any poisonous or deleterious elements or ingredients, to disclose the formulæ by which they are compounded and the ingredients and portions thereof, which embody valuable trade secrets, and that if said sections and said regulations are enforced against the plaintiff, as interpreted and construed by the defendants, plaintiff will be deprived of its property without due process of law and will be denied the equal protection of the laws, contrary to the said amendments.

15. Plaintiff further alleges that said section 3 and said part of section 8 of the Kansas food and drugs law, and said regulations 3, 4 and 6, are void for the further reason that they are repugnant to, and in conflict with, section 8 of article 1 of the constitution of the United States, in that the said laws, rules and regulations, as interpreted and construed by the Board of Health, and its executive officer, the defendant, S. J. Crumbine, constitute an unreasonable interference with interstate commerce, in which the plaintiff is engaged.

8 16. Plaintiff further alleges that no judgment of any court has ever been rendered, determining that said Mary Jane syrup is misbranded.

17. Plaintiff further alleges that the label hereinbefore set out meets with every requirement of, and complies with every provision of, the federal food and drugs act, and of the Kansas food and drugs law, except said regulation No. 6.

18. Plaintiff further alleges that the said Board of Health, and its executive officer, the defendant, S. J. Crumbine, claim that the said Mary Jane syrup, as labeled by the plaintiff, is misbranded because the label does not contain the word "compound" and because the label does not state the percentage of each ingredient of which said Mary Jane syrup is composed.

19. Plaintiff further alleges that the said Board of Health, and its executive officer, the defendant, S. J. Crumbine, pretending and assuming to act under and by virtue of the authority of said regulations 3, 4 and 6, have arbitrarily and unlawfully notified the plaintiff's agents and representatives, and the wholesale and retail merchants dealing in said Mary Jane syrup in the state of Kansas, that said syrup as furnished to said wholesale merchants by the plaintiff is misbranded in the particulars above specified, and that it is unlawful to sell, or offer the same for sale, in the state of Kansas under said brand.

20. Plaintiff further alleges that the said Board of Health, and its executive officer, the defendant, S. J. Crumbine, have notified the plaintiff's agents and representatives, and the persons selling and offering the said Mary Jane syrup for sale within the state of Kansas under the said brand, that they will be prosecuted for so doing, and have wrongfully and unlawfully stated and declared to plaintiff's agents and representatives, and to persons dealing in said Mary Jane syrup in the state of Kansas, that unless the plaintiff has attached in a conspicuous place on the outside of each can of said Mary Jane syrup imported into and sold, or offered for sale, within the state of Kansas, a label with the word "compound" printed thereon, and stating definitely in conspicuous letters, in addition thereto, the percentage of each ingredient of which said Mary Jane syrup is composed, they will cause the arrest and prosecution of said persons, and of every person selling, or offering the said Mary Jane syrup for sale, within the state of Kansas; that the said Board of Health,

9 and its executive officer, the defendant S. J. Crumbine, have sent, or caused to be sent, many letters to merchants to whom the plaintiff has been furnishing large quantities of said Mary Jane syrup, in the manner and under the label hereinbefore specified, and to retail merchants to whom the said wholesale merchants have been supplying said syrup under the brand aforesaid, and to retail merchants who have been selling the said Mary Jane syrup to consumers for domestic use, that they will be prosecuted for selling, or offering for sale, the said Mary Jane syrup unless and until the same shall have been branded or labeled by printing the word "compound" and the percentage of each ingredient of which said Mary Jane is composed upon the label.

21. Plaintiff further alleges that the said Board of Health, and its executive officer, the defendant, S. J. Crumbine, have in their employ a large number of deputy food inspectors, who travel about from place to place within the state of Kansas, and that, acting under the direction and authority of said defendants, the said deputy food inspectors are calling upon wholesale merchants in the state of Kansas who are customers of the plaintiff, and are advising

them that it is unlawful to sell said Mary Jane syrup under the brand hereinbefore set out, and warning them if they sell, or offer the same for sale, they will be prosecuted for so doing, thereby causing said merchants to refuse to purchase the said Mary Jane syrup from the plaintiff or its agents or representatives; that all of the aforesaid conduct on the part of the said Board of Health, and its officers and agents, has greatly damaged the sale of, and demand for, the said Mary Jane syrup within the state of Kansas, and that by reason thereof the plaintiff has suffered, and is suffering, and will continue to suffer, great financial loss, the exact amount of which it is impossible to compute, but plaintiff alleges the same to be many thousands of dollars.

22. Plaintiff further alleges that unless said defendants are enjoined from so doing, they will continue to do the things hereinbefore set out, and will continue to annoy and intimidate said plaintiff and the number of persons engaged in selling the said Mary Jane syrup in the state of Kansas, by threats of criminal prosecution, and that they will continue to tell the plaintiff's customers that they are violators of the laws of the state of Kansas, thereby obstructing the plaintiff in the conduct of its business in the state of Kansas, and interfering with its property rights, to its irreparable injury, for which said plaintiff has no adequate remedy at law.

10 23. Plaintiff further alleges that many wholesale dealers in Kansas have already refused to give the plaintiff's agents and representatives any further orders for said Mary Jane syrup, and have threatened that they will continue to refuse to do so, because of the fear of criminal prosecution induced by the defendants' threats, and that a large number of wholesale merchants who still have in their possession quantities of the said Mary Jane syrup have been so intimidated by said threats that they have refused, and will continue to refuse, to sell the same, until and unless the defendants are enjoined as prayed for herein.

Second Cause of Action.

24. For its second cause of action said plaintiff hereby refers to its first cause of action and makes the same a part of this, its second cause of action, in all respects as though the allegations thereof were set out herein in full.

25. Plaintiff further alleges that the wholesale dealers who are customers of said plaintiff, and who purchase large quantities of said Mary Jane syrup from it, as alleged in the first cause of action, have been, for many years last past, selling the said Mary Jane syrup, in the original sealed cans and under the original brand or label, to retail merchants in the state of Kansas, and that the said retail dealers have been, for many years last past, selling said Mary Jane syrup to the consumers, in the original sealed cans and under the original label, and that said Mary Jane syrup is delivered to the consumers by the retail dealers, in the original sealed cans, with the original label or brand still attached thereto; that the said Board of Health and the said S. J. Crumbine have made the same threats

to, and give the same warnings hereinbefore set out, the said wholesalers and retailers, and that on account thereof the demand for Mary Jane syrup in Kansas has been greatly lessened, and will be completely destroyed if said Board of Health and the said S. J. Crumbine are permitted to continue said unlawful and arbitrary conduct, hereinbefore set out, and that plaintiff's business in Kansas will be ruined, to its great and irreparable damage.

26. Plaintiff further alleges that it has no adequate remedy at law, and that unless the defendants are enjoined by this Honorable Court from so doing, they will continue to intimidate, annoy and threaten this plaintiff, and its customers, and other persons,
11 by said unlawful warnings and threats, and that thereby the said dealers in said Mary Jane syrup have been, and will continue to be, induced to stop selling said Mary Jane syrup in Kansas, to the great and irreparable damage of said plaintiff.

Wherefore, said plaintiff prays that the said defendants, and each of them, and each member of the said Kansas State Board of Health, their agents and employees, and their successors and deputies, be temporarily and permanently enjoined from, in any way, enforcing, or attempting to enforce, the provisions of said regulation No. 6; that they be further temporarily and permanently enjoined from notifying the plaintiff's customers, or other persons, within the state of Kansas, or elsewhere, that the said Mary Jane syrup as sold in the state of Kansas is misbranded; that they be temporarily and permanently enjoined from attempting to compel the plaintiff to label the said Mary Jane syrup "A Compound," and that they be temporarily and permanently enjoined from threatening, or taking any steps whatever, to intimidate the plaintiff's customers, and other persons, dealing in and selling the said Mary Jane syrup within the state of Kansas.

Plaintiff further prays that the said conduct of the said defendants complained of in this petition be declared to be unlawful.

Plaintiff further prays that it may have other and further relief as is just and equitable, as well as a decree for costs.

BLAIR, SCANDRETT & MAGAW,
Attorneys for Plaintiff.

On the 31st day of May, 1913, said defendants filed their demurrer herein, in words and figures as follows (caption omitted):

Demurrer.

The defendants and each of them come now here and respectfully lodge this their general demurrer to plaintiff's petition on the ground that the facts therein alleged do not state a cause of action nor warrant the granting of the relief prayed for by plaintiff in its petition.

JOHN S. DAWSON,
Attorney General.

12 Which demurrer was by the court overruled on November 29, 1913, and at the same time the court made its decision of questions of law, in words and figures as follows (caption omitted):

Decision of Question of Law under Section 278 of Code of Civil Procedure.

The principal question submitted for the decision of the court at this time is whether or not the State Board of Health under the provisions of the Kansas food and drugs law, and the regulations of the board adopted thereunder, may require the plaintiff to state upon the labels affixed to its syrup the percentage of each ingredient contained in the syrup. The label as shown by the amended petition reads in part as follows: "Mary Jane, A Table Syrup prepared from Corn Syrup, Molasses and Pure Country Sorghum. Contains Sulphur Dioxide."

The State Board of Health under section 3 of the Kansas law is authorized and directed to make and publish rules not in conflict with the laws of the state for carrying out the provisions of the act. I am of the opinion that this is not a delegation to the board of legislative power, but is merely a delegation of the power to determine facts or states of things upon which the enforcement of the law depends. Such a delegation is particularly appropriate under a law of this character.

It is provided, in substance, by section 8 of the act in question, that an article shall be deemed misbranded, the container or label of which shall bear any statement, design or device, regarding the article or the ingredients contained therein, which shall be false or misleading in any particular. It is claimed by the defendants that the plaintiff's label is misleading, to this extent at least, that it uses the term "corn syrup" instead of glucose. This question was before the federal Secretaries of the Treasury, Agriculture and Commerce and Labor, under the food and drugs act passed by Congress in 1906, and by a decision of those officials rendered February 13, 1908, it was concluded that the syrup obtained by the incomplete hydrolysis of the starch of corn was properly labeled "corn syrup" under the federal law. (See 228 U. S. 127.) The terms of that law in this respect are precisely the same as the Kansas statute.

13 Whatever opinion the state authorities would be warranted in entertaining with regard to merchandise dealt in only within this state, it is clear as to an article of interstate commerce, such as the plaintiff's syrup must be held to be under the allegations of its petition, that the view of the federal authorities must prevail. The State Board of Health can not require in such a case the removal of a valid label under the federal act and the substitution of some other term. (McDermott v. Wisconsin, 228 U. S. 155.) It seems, moreover, that "corn syrup" as well as glucose is a proper and well understood name for the article in question and it can not be fairly said that it is a misleading or deceptive appellation. (See dissenting opinion of Timlin, J., McDermott v. State, 143 Wis. 18; 21 Ann. Cases, 1320.)

The defendants, however, claim for the Board of Health, under section 3 of the Kansas law, the right to enact and enforce regulation No. 6, which requires manufacturers of proprietary foods, such

as syrups, to state upon the label the names and percentages of materials used, so far as is necessary to secure freedom from adulteration and misbranding. It is claimed by the plaintiff that the Board of Health in enacting rule 6 is exercising legislative power, and consequently that rule 6 is invalid. I do not agree with this contention. In my judgment whenever it is necessary to prevent adulteration and misbranding the board may require a statement of percentages of ingredients, provided such requirement does not violate the state law, or the act of Congress where interstate commerce is concerned. But as to the article manufactured by plaintiff, it is in the first place very doubtful whether there can be said to be any adulteration or misbranding at all within the meaning of the limitations prescribed by regulation 6. It does not appear from the amended petition, or from anything else submitted to the court thus far, that the "Mary Jane" syrup is not just what the label states it to be. If upon answer filed alleging adulteration or misbranding and issue joined thereon it shall appear that the label in question is in any way deceitful or misleading in fact, or that the plaintiff is practicing deception or fraud within the meaning of the pure food and drugs act of this state, as to the ingredients contained in its syrup, a question of fact will be presented for the determination of this court.

Aside from this view of the matter, section 8 of the Kansas law has undertaken to state that an article not containing any
14 poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the case of mixtures or compounds known as articles of food under their own distinctive names, provided the place of manufacture be stated on the label. There seems to be no doubt that the name "Mary Jane" is a distinctive name within the meaning of the law as well as within the meaning of regulation 18 adopted by the Board of Health. The law itself having expressly provided that a mixture or compound labeled as is the plaintiff's product shall not be deemed misbranded, it would seem to follow that the Board of Health is powerless to characterize the same as misbranded, by rule or otherwise, or under the guise of securing freedom from adulteration and misbranding require a statement of the percentage of the ingredients, unless fraud in fact is being practiced by plaintiff with relation thereto.

It seems not to be the purpose of the law that an article should be labeled as a "compound" under the second part of the first proviso of section 8 where such article comes under the first portion of the proviso and is sold under a distinctive name. It is apparent enough from the statement on plaintiff's label that its syrup is a compound, the names of the ingredients being given.

Some additional powers are claimed on behalf of the defendants because of an exception in the last proviso of section 8 of the Kansas act by reason of which it is said the State Board of Health is at least impliedly authorized to adopt rules and regulations requiring manufacturers of proprietary foods to disclose trade formulas for the purpose of securing freedom from adulteration and misbranding. It must be said of this proviso, however, that it merely

states a rule of construction and is not intended to broaden the powers of the Board of Health. (See 225 U. S. 533.) That board must look to section 3 and the other terms of the act construed in connection therewith for its authority to prevent adulteration and misbranding. It may undoubtedly make rules for this purpose, but the same must be consistent with the food and drugs law of this state as well as with the provisions of others laws.

Another question which has been discussed to a considerable extent in the briefs is whether the requirements of rule 6 of the State Board of Health, even if valid as to commerce within the state, may be enforced as against an article of interstate commerce.

15 It is undoubtedly a valid exercise of the police power of the state to enact laws for the protection of its people against fraud or imposition through the sale of impure food or drugs. Even though Congress may have acted upon the same subject matter, yet the state may make regulations reasonable in their terms and in a field not taken possession of by Congress.

The case of Savage against Jones, 225 U. S. 501, is relied upon by the defendants as upholding their contentions on this point, while McDermott against Wisconsin, 228 U. S. 115, is cited by the plaintiff as equally conclusive in its favor. A careful examination of these two cases will show that the laws under consideration were quite different in their effect upon interstate commerce. In Savage against Jones the Indiana statute simply covered a field not reached by the national food and drugs law, while the Wisconsin statute construed in McDermott against Wisconsin nullified and required the removal of labels which were perfectly valid under the federal law as interpreted by the authorities. There is no doubt that a state in the valid exercise of its police power may enact and enforce a law such as the food and drugs act in question in this case. The same subject matter may be dealt with as that included in an act of Congress provided the state regulations are reasonable in their terms and not in conflict with the federal enactment. But the state may not set aside or nullify any requirements made by Congress as to articles of interstate commerce and it may not reasonably interfere in any way with interstate commerce. It must be concluded, under the authority of Savage against Jones, that the State of Kansas *of* its Board of Health, within proper limits and under some circumstances, may require a statement of the percentage of ingredients of articles of interstate commerce while still unsold in the hands of an importer but neither the state nor its Board of Health can make such requirements if they impose an unreasonable burden upon interstate commerce or if their enforcement nullifies or sets aside in any material way the rules and regulations prescribed by Congress upon the same subject matter.

As already indicated, the statute under consideration in Savage against Jones, supra, was held by the supreme court of the United States to cover a field not taken possession of by Congress. But this can not be said of the Kansas food and drugs law. It is almost word for word a reproduction of the federal law. If Con-

16 gress has limited the scope of its prohibitions in its food and drugs law, so also has the state of Kansas, because both cover exactly the same territory. Nor can it be said that the State Board of Health, acting under and limited by the terms of the state statute, by its own rules may broaden the field of state regulation. (See Savage v. Jones, 225 U. S. 501, 532.)

Conclusions.

I. Rule 6 of the State Board of Health is not invalid because the power under which the same was made was a delegation of legislative authority to the Board.

II. The Board of Health, within the limits prescribed by the food and drugs law and for the purpose of preventing adulteration and misbranding, may require manufacturers of proprietary foods to state on the labels the names and percentages of the ingredients used, but it may not do so when such requirement conflicts with the terms of the law itself.

III. The syrup manufactured by the plaintiff is a compound known under its own distinctive name and the label is not on its face deceptive or misleading. Such label is sufficient under the terms of the Kansas food and drugs act.

IV. The Kansas food and drugs law and the federal law on the same subject being practically identical, it can not be said that the former covers ground not included in the latter within the rule stated in Savage v. Jones, 225 U. S. 501.

V. Inasmuch as plaintiff's syrup is an article in interstate commerce, and the designation of the same on the label as "corn syrup" being sufficient under the decision of the federal officials, the State Board of Health cannot require such designation changed to "glucose." (McDermott v. Wisconsin, 228 U. S. 115.)

On the 5th day of February, 1914, said defendants duly filed their answer herein, in words and figures as follows (caption omitted):

Answer of the Defendants to Plaintiff's Amended Petition.

Come now the above-named defendants and for their answer to plaintiff's amended petition admit each and all of the allegations set out in the 1st and 2d paragraphs of said petition, and
17 defendants deny the allegations set out in the 3rd and 4th paragraphs of said amended petition, admit the allegations in the 5th paragraph of the petition, admit the allegations set out in the 6th paragraph of said petition, except that the defendants deny that plaintiff's entire business in the state of Kansas is conducted in the manner set out in said 6th paragraph.

Defendants admit that the name, "Mary Jane," is well known to the public as the name of a syrup for domestic use, and that said

name is protected under trademarks of the United States, as alleged in the 7th paragraph of said amended petition.

Defendants further admit each and all of the allegations set out in paragraph 8 of the amended petition.

Defendants deny each and all of the allegations contained in the 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th paragraphs of the amended petition.

Defendants admit that it is claimed by the defendant S. J. Crumbine that the said "Mary Jane" syrup, as labeled by the plaintiff, is misbranded because the label does not contain the word "compound," and because the label does not state the percentage of each ingredient of which said "Mary Jane" syrup is composed, but deny that the above are the only grounds on which it is claimed that "Mary Jane" syrup, as labeled by the plaintiff, is misbranded.

Defendants admit that the said State Board of Health and its executive officer, the defendant S. J. Crumbine, assuming to act under and by virtue of the authority of regulations 3, 4 and 6, heretofore referred to and set out in paragraph 8 of plaintiff's amended petition, has notified the plaintiff's agents and representatives and the wholesale and retail merchants dealing in said "Mary Jane" syrup in the state of Kansas, that said syrup, as furnished to said wholesalers by the plaintiff, is misbranded, and that it is unlawful to sell or offer the same for sale in the state of Kansas under said brand, but deny that in doing so they have acted arbitrarily and unlawfully, and deny each and every other allegation contained in the 19th paragraph of said amended petition.

Defendants deny each and all of the allegations set out in the 20th and 21st and 22d and 23d paragraphs of the plaintiff's amended petition, and deny each and every allegation contained in the
18 24th, 25th and 26th paragraphs of plaintiff's amended petition.

And further answering, these defendants allege and say that the plaintiff is now and was at the time, and all the time set out in their amended petition, a corporation organized and existing under and by virtue of the laws of the state of New Jersey, having its chief office in New York City, and that the plaintiff is now and has been for many years last past engaged in the manufacture of a syrup and that said syrup has been commonly called and is called "Mary Jane" syrup and is sometimes sold under the name of "Mary Jane" Sorghum.

That the Board of Health, for the purpose of preventing misbranding and adulteration, promulgated the rules set out in paragraph 8 of plaintiff's amended petition and required manufacturers of proprietary foods to state on the labels the names and percentages of the ingredients used.

And further allege that the syrup manufactured by the plaintiff herein, and the subject of the litigation, comes within the provisions of said order of the board, and that said label under which said syrup is sold is insufficient and misleading in fact in that said label is of such a nature as to lead purchasers of said syrup to believe that said

syrup is composed of about equal parts of corn syrup, molasses and pure country sorghum.

And further allege that it is deceptive in this, to wit, that it does not contain or set out the amount of sulphur dioxide contained in said syrup.

That said brand and label is used for the purpose of misleading wholesale and retail dealers and misleading the public into the belief that said syrup is a syrup composed of equal parts of corn syrup, molasses and pure country sorghum, as hereinbefore set out, and that such label is deceitful and misleading in fact.

That while said label contains the statement hereinabove set out, that said syrup contains corn syrup, molasses and pure country sorghum, it is sold and billed to wholesalers as "Mary Jane" sorghum.

Defendants further allege that the sorghum is a much more expensive compound than corn syrup or molasses syrup, and that while such label would convey, and does convey, the idea, as hereinbefore set out, that said syrup is composed of equal parts of corn
19 syrup, molasses and pure country sorghum, there is only enough sorghum and molasses contained in said "Mary Jane" syrup to give a color and to make it look and appear as a sorghum syrup, but that for other purposes than to make said syrup appear in color as a sorghum syrup the amount of sorghum is negligible and of such small per cent as to add little, if anything, to the value of said syrup; and that by reason of the facts hereinabove set out said label on the said "Mary Jane" syrup is deceitful and misleading in fact, and the plaintiff, in using the same, is practicing deception and fraud within the meaning of the pure food and drug act of the state of Kansas as to the ingredients contained in its syrup.

That the regulations made by the Board of Health and set out in paragraph 8 of plaintiff's amended petition are valid and reasonable regulations, authorized under the laws of the state of Kansas, and that the State Board of Health had full power and authority, under and by virtue of said laws, to make said regulations.

And further allege that plaintiff herein has failed to comply with the order of said Board of Health made as set out in the 8th paragraph of said amended petition.

That by reason of the facts herein stated the plaintiff is not entitled to the relief prayed for.

Wherefore, defendants pray that the injunction asked for be denied and that the plaintiff take nothing by reason of said suit and that defendants recover their costs herein, and for such other and further relief as to the court may seem just and equitable.

The reply was a general denial of all new matter contained in the answer.

Said cause came regularly on for trial, before the court without a jury, and the plaintiff offered in evidence the affidavit of Newman Hamlink, in words and figures as follows (caption omitted):

Affidavit.

Newman Hamlink, being first duly sworn, deposes and says: That he resides in the state of New Jersey, town of Haworth; that he is in

the employ of the Corn Products Refining Company, plain-
20 tiff herein, as manager of the Western Grocery Department;
that he has been in the employ of said company for three years, and that he is thoroughly familiar with its methods of doing business, and particularly with its method of manufacturing, labeling, selling and shipping the table syrup manufactured by the plaintiff company and known as "Mary Jane."

Affiant further states that the general office and principal place of business of the plaintiff company is in the city and state of New York; that its principal factories for the manufacture of Mary Jane are located at Granite City and Argo, Illinois; that Mary Jane is a table syrup prepared from corn syrup, molasses and pure country sorghum; that the sorghum in this mixture contains sulphur dioxide in small quantities, considerably less than is permitted by the United States food law and regulations adopted pursuant thereof; that Mary Jane is always sold in cans of uniform size, containing either 1½ pounds, 5 pounds or 10 pounds; that each of the sealed cans containing Mary Jane syrup is, before it leaves the factory of the plaintiff, marked with a label, which varies only as to size and as to the marked weight thereon; that a true sample or copy of the said label attached to all cans containing Mary Jane is attached thereto, marked "Exhibit A," and made a part of this affidavit; that the name Mary Jane is a copyrighted one, protected under the copyright laws of the United States, and is a distinctive name of this particular article of food and is not the name of any other article of food; that the syrup known as Mary Jane is manufactured and prepared by the plaintiff under a private formula and that both the name and the formula of said syrup are the private property of the plaintiff, and that the plaintiff holds and owns the exclusive right and title to the making and preparing of a syrup by the said name and formula; and the plaintiff is the exclusive proprietor and owner of the right to manufacture Mary Jane and that Mary Jane is a proprietary article of food and is always sold to the consumer under the distinctive name of Mary Jane, as displayed on the label, a copy of which is attached hereto.

Plaintiff has for years last past had agents and representatives employed in soliciting orders for Mary Jane syrup from wholesale merchants in the state of Kansas and in other states of the United States;
that said representatives and agents call upon wholesale mer-
21 chants in the state of Kansas and solicit and take orders for such quantities of Mary Jane as may be agreed upon, and that said orders are forwarded to the plaintiff at its factories in Granite City and Argo, Illinois; that all such orders are subject to the approval of the plaintiff in Granite City or Argo, Illinois; that the plaintiff has not now, and never has had, a stock of said syrup in the state of Kansas, but that in all cases the said orders are filled by the plaintiff at its factory in Granite City, or that in Argo, Illinois, by selecting the number of cans ordered, from its stock in that place, and delivering them, packed in boxes and labeled with the label hereinabove described, to carriers at Granite City, or at Argo, Illinois, duly consigned to the parties specified in the orders, and that such

carriers duly transport said syrup and deliver it to the consignees in the state of Kansas, in the original sealed cans with the original labels still attached thereto, and that all of the business conducted by the plaintiff in the sale of Mary Jane to dealers in the state of Kansas is conducted in the manner aforesaid.

Affiant further states that billing clerks in the employ of the plaintiff have, in occasional instances called to the attention of the plaintiff, issued invoices for shipments of Mary Jane, which invoices described the article shipped as "Mary Jane Sorghum," but that in each such instance the billing clerk has so marked the invoice erroneously and without authority from and contrary to the directions of the plaintiff, and that in each and every instance where Mary Jane is sold and shipped by the plaintiff to dealers in Kansas the label upon the sealed cans which contained the said Mary Jane syrup has been the label hereinbefore described and a copy of which is hereto attached.

Affiant further states that the plaintiff has suffered very considerable losses as a result of food inspectors of the state of Kansas notifying the wholesale and retail trade in that state that said wholesale and retail dealers are violating the law by selling Mary Jane in the state of Kansas, and that as a result of such statements made by food inspectors of the state of Kansas in many instances retailers refused to handle said Mary Jane and wholesalers have insisted upon the Refining Company taking back Mary Jane already purchased.

NEWMAN HAMLINK.

22 Exhibit A can not be reproduced here, but will be exhibited at the hearing of this cause. It did not show the percentages of the ingredients of the syrup, did not contain the words "compound," "imitation" or "blend," or any of them, and did not show the place of manufacture.

Thereupon plaintiff offered in evidence the affidavit of J. F. Tilford, in words and figures as follows (caption omitted):

Affidavit.

J. F. Tilford, being first duly sworn, deposes and says that during the month of April, 1913, and for a number of months prior thereto and thereafter, he was in the employ of the State Board of Health of the state of Kansas as assistant chief food and drug inspector; that it was a part of his duties as such officer to supervise the enforcement of the pure food and drugs laws of the state of Kansas and the regulations of the Kansas State Board of Health relating to foods and drugs.

Affiant further states that on or about the 7th day of April, 1913, he received information that various wholesale grocery dealers, among them Ryley-Wilson Grocery Company of Kansas City, Mo., were selling to retail grocerymen at various points in the state of Kansas a table syrup manufactured by the plaintiff in the above-entitled action known as "Mary Jane," and that the said syrup as

sold by said Ryley-Wilson Grocery Company and said other wholesale grocery dealers bore a label, a copy of which is hereto attached, marked Exhibit A, and is made a part of this affidavit.

Affiant further states that on or about the 7th day of April, 1913, as assistant chief food and drug inspector of the state of Kansas, under the direction of S. J. Crumbine, secretary of the Kansas State Board of Health, he wrote and mailed to said Ryley-Wilson Grocery Company, at Kansas City, Mo., a letter of which the paper marked Exhibit B, hereto attached and made a part of this affidavit, is, as affiant believes, a true copy, and that affiant, in the same capacity as aforesaid, on or about the same day that the said letter was written to Ryley-Wilson Grocery Company wrote and mailed, to such other wholesale grocery dealers as he had been informed and believed were selling the said Mary Jane syrup at wholesale
23 in the state of Kansas under the aforesaid label, letters of substantially similar wording to the letter aforesaid, copy of which is attached hereto as Exhibit B.

Exhibit A can not be reproduced here, but will be exhibited at the trial of this cause. It did not show the percentages of the ingredients of the syrup, did not contain the words "compound," "imitation" or "blend," or any of them, and did not show the place of manufacture.

EXHIBIT B.

TOPEKA, KAN., April 7, 1913.

Ryley-Wilson Gro. Co., Kansas City, Mo.

GENTLEMEN: This department is in receipt of the information from dealers in this state that they have had on hand the "Mary Jane" syrup which has been sold them by you and which is not properly labeled as is required by the Kansas requirements, showing the percentages of the ingredients for this compound syrup. Your attention is invited to this matter at this time for the reason that we find a large amount of this product has been shipped into this state, which has not been properly labeled, and we will have to ask that the sale of this syrup in this state be discontinued until such time as it is properly labeled. Also that such shipments as have already been made be taken up or be properly labeled.

Copy of our food and drug law is being sent you under separate cover. Your attention is invited to page 6, regulation 11, in the case of syrups; also to section 8 in the case of foods, under the provision, 1st, for mixtures and compounds, which it will be seen requires this syrup to be properly labeled as a compound and the word "compound" to be upon the label.

You will find, I believe, the federal requirements are the same. We will ask you to advise us at once what is done in this matter.

Yours very truly,

J. F. TILFORD,

Assistant Chief Food and Drug Inspector.

24 Thereupon said plaintiff offered in evidence the affidavit of F. C. Wood, in words and figures as follows (caption omitted):

Affidavit.

F. C. Wood, being first duly sworn, deposes and says: That he is a member of the firm of Jett & Wood, whose office and principal place of business is in the city of Wichita, Kansas; that said firm is engaged in the manufacturing and wholesale grocery business; that for some time prior to the month of April 1913, the said firm had been selling at wholesale and distributing to retail grocerymen in the state of Kansas a table syrup known as "Mary Jane," which said table syrup was manufactured by the above-named plaintiff, Corn Products Refining Company, and which was shipped to the said firm of Jett & Wood by said Corn Products Refining Company in boxes containing cans of said syrup in various sizes, and that said cans each bore a label or brand, a copy of which label or brand is attached hereto, marked Exhibit "A" and is made part of this affidavit.

Affiant further states that on some day near the first day of April, 1913, a food and drug inspector in the employ of the Kansas State Board of Health, called at the office of affiant's firm and notified the said firm orally that the label or brand then being used upon the cans containing "Mary Jane" did not comply with the Kansas pure food laws, nor with the regulations of the Kansas State Board of Health, relating to the branding of syrups; that the said syrup when labeled with the brand, copy of which is hereto attached as Exhibit A, was misbranded, and that the sale thereof by the firm of Jett & Wood or other dealers, under the said brand or label, would subject the said firm of Jett & Wood, or such other dealers as sold said syrup under said brand, to criminal prosecutions under the Kansas food and drug law; and the said inspector warned affiant's firm that it would be necessary for it to discontinue the sale and distribution of the said "Mary Jane" under the aforesaid label, in order to avoid prosecution of said firm under the Kansas food and drug law.

Affiant further states that his said firm received advice by notice given to its salesmen from several of its customers on or about the first day of April, 1913, that the said customers had also been visited by inspectors in the employ of the Kansas State Board of Health and had been warned by such inspectors that the sale of
25 "Mary Jane" under the said label was illegal, and that if they continued to sell said syrup under said label they would become subject to criminal prosecution.

Affiant further states that on the 13th day of April, 1913, he wrote a letter to Mr. J. F. Tilford, assistant chief food and drug inspector of the state of Kansas, a copy of which letter is hereto attached, marked Exhibit B, and is made a part of this affidavit; and that on the 17th day of April, 1913, there was written by said J. F. Tilford a letter addressed to the firm of Jett & Wood, Wichita, Kansas, and received by said firm in due course of mail, a copy of

which letter is hereto attached, marked Exhibit C and made a part of this affidavit.

Affiant further states that soon after the commencement of this action a circular letter written by the plaintiff and addressed to "Kansas Jobbers" was received by affiant's firm advising that the Kansas State Board of Health had agreed to discontinue its efforts to prevent the sale of "Mary Jane" under the aforesaid label during the pendency of this action and that the said Corn Products Refining Company would protect dealers against any liabilities that might be incurred by them on account of the sale of said syrup under said label.

Affiant further states that after the receipt of said circular letter no further effort was made by the Kansas State Board of Health to prevent affiant'- firm from selling the said syrup under the said label.

And further affiant saith not.

Exhibit A can not be reproduced here, but will be exhibited at the hearing of this cause. It did not show the percentages of the ingredients of the syrup, did not contain the words "compound," "imitation" or "blend," or any of them, and did not show the place of manufacture.

EXHIBIT B.

April 12, 1913.

Mr. J. F. Tilford, Asst. Chief Food and Drug Inspector, Topeka, Kan.

DEAR SIR: Pertaining to Mary Jane sorghum, and your request that we make no further shipments to our Kansas customers, kindly note that we have referred the matter to the Corn Products Refining Co., and we are in receipt of their reply this morning, a copy of which you will find herewith enclosed.

26

We trust that there will be no reflection on us in being governed by their instructions.

Yours truly,

JETT & WOOD.

EXHIBIT C.

TOPEKA, KAN., April 17, 1913.

The Jett & Wood Grocer- Co., Wichita, Kan.

GENTLEMEN: This departmnet is in receipt of your letter of the 12th, together with copy of letter from the Corn Products Company, relative to Mary Jane syrup, and thank you very much for so promptly advising us in this matter.

There is, of course, nothing further for us to say in this matter. It seems to be a question for the courts to decide as to whether we are right. We thoroughly believe that under the provisions of the food and drug law we have the right to require, in order to keep misbranded and adulterated goods out of the market, as in the case of syrups, that the percentage of ingredients be shown.

As to you being governed by their instructions, that is, of course, a matter entirely for you to decide. Every one selling goods of any kind in this state is, of course, responsible for those goods, in that they comply with the laws of the state.

Very truly yours,

(Signed) J. F. TILFORD,
Asst. Chief Food and Drug Inspector.

T. B. WAGGONER, a witness called by the plaintiff, testified as follows:

I reside in New York City, and am employed by the plaintiff, and have been so employed since 1909. I have been connected with the business since 1898. Plaintiff's business is manufacturing products of corn, such as corn syrup and corn oil. It manufactures a table syrup known as Mary Jane, and has been manufacturing it for five years. The sale of Mary Jane amounts to almost one-quarter of plaintiff's syrup business, which in 1912 amounted to four million cases, or, roughly speaking, a million and a half dollars, for Mary Jane alone. Mary Jane is manufactured at St. Louis, Ill., and Grant City, Ill. (Rec. 3.) Mary Jane is a blend of 85 per cent corn syrup, 10 per cent molasses, and 5 per cent
27 sorghum. Molasses is made from sugar cane, and sorghum from sorghum cane. (Rec. 4.) I have charge of the complaints made before the boards of health of the various states. To the best of my knowledge, there has been no judgment of any court that Mary Jane syrup as now branded is misbranded. (Rec. 7.) If there had been such a judgment I would know it, unless there was a mistake on somebody's part. I am in charge of that department of the company's affairs. (Rec. 8.) I received telegrams or letters from dealers in Mary Jane in Kansas in April, 1913, among them telegrams from the Gillman Grocery Company, and one from Fort Scott, stating that representatives of the State Board of Health had told the writers that Mary Jane was not labeled in accordance with law, and must not be sold. We were asked by some to take back the product and cancel orders. Mary Jane contains nothing that is injurious to health. It is a wholesome product. (Rec. 9.) Kansas is one of the states in which Mary Jane is very popular. Kansas business is carried on through brokers, merchants, and jobbers, and we have agents who visit dealers, and we supply amounts to wholesalers, and turn over to wholesalers the business in certain territories, and they send the orders in to New York, and we in turn send them to the factory, and the orders are filled from there. The head office of the company is in New York, and we have a branch western office in Chicago. Plaintiff does not carry a supply of Mary Jane in Kansas. (Rec. 10.)

Cross-examination:

"Q. One of the affidavits shows a case of Mary Jane sorghum bought at the Green Grocery Company at Kansas City, and there is a note on the invoice which says, 'Syrup order taken by E. D. Burgin; rebate $1.10'; and the retail grocer makes affidavit that he

mailed the invoice to the Corn Products Refining Company, and obtained a rebate.

"A. We have an arrangement that we give one case free with every ten cases sold or bought by the trade, and that is what he refers to. One case free with five cases, or one case free with ten." (Rec. 11.)

Redirect examination:

We put the ingredients contained in Mary Jane on the label where it is for sale in Minnesota. We are selling Mary Jane as a proprietary and distinct name because of the food laws in the sep-
28 arate states, and without disclosing the formula, except that the matter is in litigation in Nebraska. The objection to putting the percentage on the label is that the success of a syrup like Mary Jane is not due to the mechanical putting together of three different kinds of syrup; but it takes more skill and experience to accomplish that, and if we would be compelled to set out the formula it would in my opinion be injurious. It would permit cheap imitations of our product, and put our products in discredit. (Rec. 12.)

T. B. WAGGONER, recalled, testified as follows:

I think there is very little if any pure sorghum sold. The blend is more satisfactory and more pleasant. The average market value of pure sorghum, as compared with cane molasses or glucose, depends upon the locality. In Fort Scott, for instance, there is some difference in the selling price of corn products and sorghum, because the corn products have to be brought from the East. The corn products are manufactured only east of the Mississippi. Sorghum is manufactured principally in Kansas, Kentucky, and Illinois. It is manufactured near Fort Scott, Kan. We have bought in Kentucky sorghum for less price than the market price of corn syrup.

Plaintiff rests.

Thereupon said defendants offered in evidence the affidavit of George Gerner, in words and figures as follows (caption omitted):

Affidavit.

George Gerner, of lawful age, being first duly sworn, upon oath states:

That he resides and carries on the grocery business at Rosedale, Wyandotte county, Kansas, and that shortly after the 29th day of July, 1914, he received from the T. Green Grocery Company, of Kansas City, Mo., an invoice for groceries ordered by him from said T. Green Grocery Company, which invoice is hereto attached, marked Exhibit A and made a part hereof. That said invoice of groceries
29 was ordered from the salesman of said T. Green Grocery Company, and that said salesman entered said order as for one case, two-pound Mary Jane Sorghum, and that he mailed said invoice to the Corn Products Refining Company and received $1.10 rebate. And further affiant saith not.

EXHIBIT A.

Green Grocer Co.

Wholesale Grocers.

St. Louis Ave. & Santa Fe St.

KANSAS CITY, Mo., July 29, 191-.

Sold to Geo. Gerner, S. W. Blvd. Rosedale, Kans.:

5 Cases Grape Nuts, 5, 250	12.50
1 Box 18 Yeast Foam	58
1 Case Dromadary Tapioca	2.50
3 Cases #2 Blue Karo Syrup, 3, 1.80	5.40
1 case 1½ Red Karo Syrup	3.60
1 case #2 Mary Jane Sorghum	1.80
	26.38

NOTE.—Syrup order taken by E. D. Burgin, 6/10. Rebate 1.10.

Thereupon said defendants offered in evidence the affidavit of Fred Gampper in words and figures as follows (caption omitted):

Affidavit.

Fred Gampper, of lawful age, being first duly sworn, upon oath states:

That he resides and carries on the grocery business at Hiawatha, Brown county, Kansas, and that shortly after the 15th day of January, 1914, he received from the Doland Mercantile Company, of Atchison, Kan., an invoice for groceries ordered by him from said Doland Mercantile Company, which invoice is hereto attached, marked Exhibit A and made a part hereof. That said invoice of groceries was ordered from the salesman of said Doland Mercantile Company, and that said salesman entered said order as for one case, two-pound Mary Jane sorghum.

And further affiant saith not.

30 EXHIBIT A.

The Dolan Mercantile Co.

Wholesale Grocers.

ATCHISON, KANSAS, 1, 15, 1914.

Sold to F. Gampper, Hiawatha, Kansas:

4 Sks. Cane Sugar, 4, 4.60	18.40
1 Cs. 2# SF P Nut Butter	1.95
1 Cs. #5 SF Pure Sorghum	3.75
1 Cs. #2 Mary Jane Sorghum, 4, 4.60, 18.40	26.00
Fr't on sugar 400# @ 13	52
	25.48

Thereupon defendants offered in evidence the affidavit of A. G. Pike in words and figures as follows (caption omitted):

Affidavit.

A. G. Pike, of lawful age, being first duly sworn, upon oath states: That he is a state food inspector, working under the direction of the Kansas State Board of Health; that attached hereto, marked Exhibit A and made a part hereof, is a label which affiant removed from an original can sold by the Corn Products Refining Company; said can affiant found upon the shelves in a store in Leavenworth, Kan., on the 9th day of January, 1915; and that attached hereto and marked Exhibit B and made a part hereof is a label which affiant removed from an original can which affiant found in a grocery store in ——, in the month of December, 1914. And further affiant saith not.

Exhibits A and B can not be reproduced here, but will be exhibited at the hearing of this cause. Both contained the words "sorghum flavored syrup" across the top of the label, and the words "syrup 85%, molasses 10%, sorghum 5%," in large black letters across the bottom.

Thereupon defendants offered in evidence the affidavit of W. E. Jett, in words and figures as follows (caption omitted):

Affidavit.

W. E. Jett, of lawful age, being first duly sworn, upon oath states: That he is a member of the firm of Jett & Wood, wholesale grocers, doing business at the city of Wichita, Sedgwick county,
31 Kansas; that attached hereto, marked Exhibit A and made a part hereof, is an original invoice received from the above-named plaintiff, the Corn Products Refining Company, shortly after

the date shown thereon, for goods ordered by said Jett & Wood from said plaintiff. And further affiant saith not.

EXHIBIT A.

Corn Products Refining Company, 17 Battery Place.

NEW YORK, Jan. 31, 1913 AB.

Sold to Jett & Wood, Wichita, Kansas:
Destination Same.
Broker Robt. Williams 260.

50 CS.	10#	Mary Jane Sorghum,	2.10		105.00
25 CS.	5#	" " "	2.20		55.00
25 CS.	2#	" " "	1.90		47.50
					207.50
					27.29
					180.21

Thereupon defendants offered in evidence the affidavit of Bertram Orde in words and figures as follows (caption omitted):

Affidavit.

Bertram Orde, of lawful age, being first duly sworn, upon oath states: That he is the secretary and treasurer of the Fort Scott Sorghum Syrup Company, a corporation, and that he resides in Fort Scott, Kan., that said Fort Scott Sorghum Syrup Company is the manufacturer of a brand of syrup known as "Farmer Jones," which syrup is a compound containing forty-five per cent of pure sorghum. Affiant further states that attached thereto, marked Exhibit A and made a part hereof, is a price list issued by the above-named plaintiff, the Corn Products Refining Company, dated March 15, 1913, and that the Mary Jane referred to in said Exhibit A is the only kind of syrup of any kind manufactured or sold by the said plaintiff, the Corn Products Refining Company under the name of Mary Jane.

32 EXHIBIT A.

New Karo Price List—Zone 1.

Freight prepaid on 5-box lots and upward.

On shipments made by your house from its stock, freight will be prepaid and 25¢ per cwt. charged back to us.

Karo and sugar both take 4th-class rate.

Prices for Zone 1.

Karo—Blue Label.			Karo—Crystal White.		
24-2	lb. size	$1.80	48-1½	lb. size	$3.60
12-5	"	2.10	2	"	2.10
6-10	"	2.00	5	"	2.45
3-20	"	2.05	10	"	2.35
			20	"	2.40

Our own salesmen will sell only at these prices. They will not be permitted to deviate.

Mary Jane Sorghum takes the same price and terms as Karo Blue Label.

Consult us for prices in other territories.

CORN PRODUCTS REFINING COMPANY.

For additional copies this list ask for Edition 3, Section B. March 15th, 1913.

Thereupon defendants offered in evidence the affidavit of Jas. L. Tudhope in words and figures as follows (caption omitted):

Affidavit.

Jas. L. Tudhope, of lawful age, being first duly sworn, upon oath states: That he is a salesman in the employ of the Fort Scott Sorghum Syrup Company, and that on or about the 4th day of April, 1914, one Rob Sikes, who was then a salesman in the employ of the Corn Products Refining Company, and authorized to represent said company, stated to affiant that Mary Jane syrup, manufactured by said Corn Products Refining Company, contained the same percentage of sorghum as the Farmer Jones syrup manufactured by the Fort Scott Sorghum Syrup Company. And further affiant saith not.

33 Thereupon defendants offered in evidence the affidavit of Leonard Rude, in words and figures as follows (caption omitted):

Affidavit.

Leonard Rude, of lawful age, being first duly sworn, upon oath says: That he resides in the town of Labette, Labette county, Kansas,

and that he is proprietor of a general store located in said town; that on or about the 6th day of March, 1915, he ordered from C. C. Boxley, who was then a salesman of the Kansas City Wholesale Grocery Company, a shipment of Mary Jane syrup, which shipment was shipped direct to affiant from the house at Kansas City, Mo., and was received by affiant on the 11th day of March, 1915; that attached hereto, marked Exhibit B and made a part hereof, is a label taken from one of the cans contained in said shipment. That all the labels on the other cans contained in said shipment were similar to the label hereto attached. Also attached is Exhibit A, invoice of March 8, 1915. And further affiant saith not.

EXHIBIT A.

Kansas City Wholesale Grocery Co.

Importing and Jobbing Grocers.

3/8/15 RM. Kansas City, Mo.

L. Rude, Labette, Kans.:

1 dz. Eagle Milk	1		1.65	
3 dz. #20 Gloves	3	84	2.55	
3 dz. 950 Gloves	3	110	3.30	
5 dz. 347 Gloves	5	75	3.75	
2 dz. Cong. Pocket Tablet	24	3¼	.78	
1 Ct. 24/½ Waneta Cocoa	2	135	2.70	
35# Blk. Eyed Peas	35	7¾	2.71	
1 Cs. 24/2 Red Karo	1		2.30	
1 Cs. 6/10 Mary Jane Sorg.	1		2.25	
1 Cs. 6/10 Red Karo	1		2.75	
2 Cs. 12/5 Red Karo	2	280	5.60	30.34

Exhibit B cannot be reproduced here, but will be exhibited at the hearing of this cause. It bore across the top of the label the words "sorghum flavored syrup" and across the bottom the words "corn syrup 85%, molasses 10%, sorghum 5%."

34 Thereupon defendant offered in evidence the affidavit of Jerre Lasley, in words and figures as follows (caption omitted):

Affidavit.

Jerre Lasley, of lawful age, being first duly sworn, upon oath states: That he resides in and is engaged in the grocery business in Sherwin, Cherokee county, Kansas; that on the 5th day of November, 1913, affiant ordered from the Glick Mercantile Company, of Pittsburg, Kan., through Harry Glick, its salesman, one case of Mary Jane, No. 101, syrup, and that the said Harry Glick at that time represented said Mary Jane syrup to be sorghum and better than Farmer Jones syrup. And further affiant saith not.

E. H. S. BAILEY, a witness called on behalf of the defendant, testified as follows:

I am professor of chemistry at the University of Kansas, and one of the chemists of the State Board of Health. I have paid attention to the analysis of food for twenty-five or thirty years. I know what effect five per cent of sorghum would have upon a composition composed of eighty-five per cent corn syrup, ten per cent molasses, and five per cent sorghum. It would act simply as a flavor. It would add nothing to the nutritive value of the composition. Fifty per cent would not add anything to it. (Rec. 16.)

V. B. KISTLER, a witness called by the defendant, testified as follows:

I am in the wholesale grocery business in Topeka, and have been for fifteen years. I know the selling price and value of different syrups. We handle Mary Jane syrup, and I know what we pay for it, and what we sell it for. Country sorghum sells for about forty cents a gallon in bulk. (Rec. 18.) Mary Jane syrup sells for about thirty-five cents.

Cross-examination:

We have no pure country sorghum for sale. I don't think there is any material demand for it. (Rec. 19.) All the syrups we handle, with one exception, are blends. The exception is maple syrup. Corn syrup is not as valuable as sorghum. People do not, as a usual thing, call for corn syrup or glucose.

35 *Plaintiff's Rebuttal.*

T. B. WAGGONER, recalled by plaintiff, testified as follows:

The label attached to the affidavit of A. G. Pike, which contains at the top, "Sorghum flavored syrup," is not in general use in Kansas. That was intended for the state of Minnesota, which law requires that kind of a label, and also the percentages. (Rec. 22.) We have been using that label three years in Minnesota. The other label that had been introduced which showed the percentages is not in general use in Kansas. It was put on Mary Jane which was intended for sale in other states. (Rec. 23.)

Cross-examination:

We object to putting the percentages on the labels in Kansas, because the law does not require it. I distinguish between the rules of the Board of Health and the law itself. (Rec. 24.) The invoice attached to the affidavit of W. E. Jett is one such as occasionally goes out, without our knowing it, from headquarters.

Redirect examination:

When we put a new product out we advertise to the trade exactly what the product is. When we put out the new sorghum mixture, Mary Jane, and we believed this to be a good product, the trade knows that that is a mixture, and furthermore the trade also knows

that the Corn Products Refining Company is a manufacturer of corn syrup, and does put up blended syrups. Our trade knows that labels like that there are intended for the customer.

Recross-examination:

The label tells the customer what the syrup is. (Rec. 26.)

Q. When you send out a price list calling it sorghum, and bill it to the retailer calling it sorghum, don't you expect the retailer to sell it to the customer calling it sorghum?

A. I don't think so. In addition I would say that was for a short period when that was billed out as sorghum, because I sent out instructions regarding our preparations.

Q. But since that time you send out price lists calling it sorghum?

A. They would only go to the jobbers.

Q. Wouldn't they lead them to represent to the trade that that was sorghum?

A. As you have heard me say before, there is no straight sorghum in the market.

Q. But the customer doesn't know it?

A. Therefore, we have to fall back on the label. That is the only way to give the customer real information.

36 Q. When you print the words "Pure Country Sorghum" on large labels (in large letters) you expect them to believe that?

A. Well, it takes a magnifying glass to see that in the first place. That was a type of printing plate. We had a printed form and have no control over that. Here is a label of the same size print. I want to say in that connection that the consumer is being educated. He buys a can of food product and studies the label and then he knows what he is getting.

Q. In studying the label you intend he should go no further than the fact that he is getting 85 per cent glucose?

A. We are following the regulations as they are given to us along that line. I will say in that connection there is more syrup consumed than either molasses or sorghum. It is not the quantity but the per cent and preparation of the sorghum that determines the quality of the mixture. (Rec. 27.)

Plaintiff sells to Sears, Roebuck & Company, and those large concerns, and they fill orders all over.

Labels offered in evidence and marked Exhibit P1 are admitted to be labels of Mary Jane syrup, but can not be reproduced here.

L. CONGDON, a witness called on behalf of the defendant, testified as follows:

I am assistant chief food and drug inspector. (Rec. 28.) I have noticed Mary Jane syrup on sale in Topeka, and have seen labels on it, containing a statement of the ingredients, in one store during the present year. The retailer said he bought it from the Davis Mercantile Company. (Rec. 29.)

It is stipulated that the regulations of the State Board of Health in regard to foods shall be considered in evidence. So far as material they are as follows:

Regulation 15.

Label.

Section 8.

(*a*) The term "label" applies to any printed, pictorial or other matter upon or attached to or wrapped about or contained in any package of food or drug product or any container thereof.

(*b*) The principal label shall consist, first, of all words which the Kansas food and drugs law of February 14, 1907, specifically
37 requires, to wit: The name of the substance or product; the name of place of manufacture, in the case of food compounds or mixtures; words which show that the articles are compounds, mixtures, or blended; the words "compound," "mixture," or "blend," or words designating the substances or their derivatives and proportions required to be named in the case of drugs and foods. All these required words shall appear upon the principal label, with no intervening description or explanatory reading-matter. Second, if the name of the manufacturer and place of manufacture are given, they shall also appear upon the principal label. Third, elsewhere upon the principal label other matter may appear, in the discretion of the manufacturer.

(*c*) The principal label on foods or drugs for domestic commerce shall be printed in English (except as provided in regulation 17), with or without the foreign label in the language of the country where the food or drug product is produced or manufactured. The size of the letters shall not be smaller than eight-point* [brevier]

Type *IN THIS LINE* is eight-point.

capitals; provided, that in case the size of the package will not permit the use of eight-point capitals the size of the letters may be reduced proportionately.

(*d*) The form, character and appearance of the labels, except as provided above, are left to the judgment of the manufacturer.

(*e*) Descriptive matter upon the label shall be free from any statement, design or device regarding the article, or the ingredients or substances contained therein, or quality thereof, or place of origin, which is false or misleading in any particular. In the case of materials used in the preparation of foods, or medicinal preparations, descriptive matter upon the label shall be free from any false or misleading statements in regard to the composition or ingredients of the food prepared by the use of such materials.

(*f*) An article containing more than one food product or an

*A *point* is 1-72d of an inch.

article containing more than one active medicinal agent is misbranded if named after a single constituent. In the case of drugs, the nomenclature employed by the United States Pharmacopœia and the National Formulary shall obtain, except as provided
38 in regulation 5. If not official or standardized, an article is misbranded if the name suggests that it contains a substance not present in the article, or leaves a false impression as to its origin, place of manufacture or production, quality or strength.

(*g*) The term "design" or "device" applies to pictorial matter of every description, and to abbreviations, characters or signs for weights, measures or names of substances.

(*h*) The use of any false or misleading statement, design or device shall not be justified by any statement given as the opinion of an expert or other person, appearing on any part of the label, nor by any descriptive matter explaining the use of the false or misleading statement, design or device.

(*i*) 1. Any article of food or drugs which under the law or regulations requires special labeling must carry such label, not only on the original package, but on all lots removed for display of the goods or for convenience of handling.

2. Any article of food or drugs which under the preceding provision does not require labeling must not be sold, exhibited, or offered for sale in such a manner as to be liable to mislead or deceive the purchaser. Deceptive or misleading oral statements touching the distinctive name of unlabeled goods are prohibited.

Regulation 16.

Name and Address of Manufacturer.

Section 8.

(*a*) The name of the manufacturer or producer, or the place where manufactured, except in case of mixtures and compounds having a distinctive name, need not be given upon the label, but if given it must be the true name and the true place. The words "packed for ——," "distributed by ——," or some equivalent phrase, shall be added to the label, in case the name which appears upon the label is not that of the actual manufacturer or producer, or the name of the place not the actual place of manufacture or production.

(*b*) When a person, firm or corporation actually manufactures or produces an article of food or drug in two or more places, the actual place of manufacture, or production of each particular package need not be stated on the label, except when, in the opinion of the secretary of the State Board of Health, the mention of any such place, to the exclusion of the others, misleads the public.

39 Regulation 17.

Character of Name.

Section 8.

(*a*) A simple or unmixed food or a drug product not bearing a distinctive name shall be designated by its common name in the English language; or, if a drug, by any name recognized in the United States Pharmacopœia or National Formulary. These regulations shall not be construed as requiring a statement of the proportion of alcohol or of the other ingredients of the United States Pharmacopœia or National Formulary preparations, except when sold in unbroken packages.

(*b*) The use of a geographical name shall not be permitted in connection with a food or drug product not manufactured or produced in that place, when such name indicates that the article was manufactured or produced in that place.

(*c*) The use of a geographical name in connection with a food or drug product will not be deemed a misbranding when by reason of long usage it has come to represent a generic term and is used to indicate a style, type, or brand; but in all such cases the state or territory where any such article is manufactured or produced shall be stated upon the principal label.

(*d*) A foreign name which is recognized as distinctive of a foreign country shall not be used upon an article of domestic origin except as an indication of the type or style of quality or manufacture, and then only when so qualified that it can not be offered for sale under the name of a foreign article.

Regulation 18.

Distinctive Name.

Section 8.

(*a*) A name, or a "distinctive name," is a trade, arbitrary or fancy name which clearly distinguishes a food or drug product, mixture or compound from any other food or drug product, mixture, or compound. It may consist of a single word or it may include words indicating special characteristics, such as the name of the manufacturer or producer, the place of origin, the source, the age, the composition, the mode of manufacture or production, or the effects attending its use.

(*b*) A distinctive name shall not be one representing any single constituent of a mixture or compound.

40 (*c*) A distinctive name shall not misrepresent any property or quality of a mixture or compound.

(*d*) A distinctive name shall give no false indication of origin,

character, or place of manufacture, nor lead the purchaser to suppose that it is any other food or drug product.

(*e*) Foods may not be offered for sale under the distinctive name of another article. This prohibition extends to oral statements by the seller calculated or liable to mislead or deceive the purchaser in any respect, and cause him to believe that he is receiving goods of a different character from that of those actually delivered.

Regulation 19.

Compounds, Imitations or Blends without Distinctive Name.

Section 8.

(*a*) The term "blend" applies to a mixture of like substances, not excluding harmless coloring or flavoring ingredients used for the purpose of coloring and flavoring only.

(*b*) If any age be stated, it shall not be that — a single one of its constituents, but shall be the average of all constituents in their respective proportions.

(*c*) Coloring and flavoring can not be used for the purpose of increasing the weight or bulk of a blend.

(*d*) In order that colors or flavors may not materially increase the volume or weight of a blend, they are not to be used in quantities exceeding 1 pound to 800 pounds of the blend.

(*e*) A color or flavor can not be employed to imitate any natural product or any other product or a recognized name and quality.

(*f*) The term "imitation" applies to any mixture or compound which is a counterfeit or fraudulent simulation of any article of food or drug.

Thereupon the court entered its judgment in said cause in words and figures as follows (caption omitted):

Journal Entry.

Now on this 10th day of July, 1915, the same being one of the regular days of the April, 1915, term of this court, this cause having been heretofore submitted to the court and taken under advisement, came on for decision. The plaintiff appeared by its
41 attorneys, Blair, Magaw & Lillard, and the defendants appeared by their attorney, John L. Hunt.

Thereupon, the court being now fully advised in the premises, finds for the plaintiff and against the defendants; that all of the allegations of plaintiff's petition are true.

It is therefore considered, ordered and adjudged by the court, that the said defendants and each of them, their agents and employees and their successors and deputies, and the defendant S. J. Crumbine, be forever enjoined from in any way interfering with the sale of Mary Jane in the state of Kansas upon the ground and for the reason that the same is misbranded when sold under the label re-

ferred to in plaintiff's petition, and that they be forever enjoined from notifying the plaintiff's customers or other persons within the state of Kansas or elsewhere that the said Mary Jane is misbranded when the label referred to in plaintiff's petition is attached to the cans, and that they be further enjoined from attempting to compel the plaintiff to label the said Mary Jane "A Compound," and from threatening to or taking any steps whatever to intimidate the plaintiff's customers of other persons dealing in or selling the said Mary Jane syrup so branded within the state of Kansas because of regulation 6, and that the plaintiff recover its costs herein, taxed at $—.

Afterwards, and at the same term and within three days, defendants filed their motion for a new trial, in words and figures as follows (caption omitted):

Motion for New Trial.

Come now the said defendants and each of them and move the court for a new trial herein for the following reasons:

(1) Because of accident or surprise which ordinary prudence could not have guarded against, whereby said defendants were not afforded a reasonable opportunity to present their evidence and be heard on the merits of the case.

(2) Because of erroneous rulings of the court.

(3) Because the decision of the court, and each and every finding and conclusion of the court, is contrary to the evidence.

(4) Because of newly discovered evidence material to the
42 case of said defendants, which they could not with reasonable diligence have discovered and produced at the trial.

(5) Because the decision of the court and each and every finding and conclusion is contrary to the law.

Said motion was overruled by the court, and thereupon defendants duly served and filed their notice of appeal.

The foregoing is a true and correct abstract of the record in the above-entitled case.

S. M. BREWSTER,
Attorney General;
S. N. HAWKES,
Assistant Attorney General;
J. L. HUNT,
Assistant Attorney General,
Attorneys for Defendants.

43 Be it further remembered, that, afterwards, on Wednesday, the 4th day of October, 1916, the same being one of the regular judicial days of the July, 1916 term of the Supreme Court of the State of Kansas, said court being in session at its court room in the city of Topeka, the following proceeding among others was had, and remains of record, in the words and figures as follows, to-wit:

44 In the Supreme Court of the State of Kansas, Wednesday, October 4, 1916.

No. 20280.

THE CORN PRODUCTS REFINING CO., Appellee,

vs.

V. C. EDDY et al., Appellants.

Journal Entry of Submission.

This cause comes on to be heard on the notices of appeal, transcript of the judgment, and abstract of the record from the District Court of Shawnee County, Div. No. 2; thereupon, after oral argument by J. L. Hunt for the appellants, and by C. A. Magaw for the Appellee, said cause is submitted on brief of counsel for both parties and taken under advisement by the court.

45 Be it further remembered, That afterwards, on Saturday, the 11th day of November, 1916, the same being one of the regular judicial days of the July, 1916 Term of the Supreme Court of the State of Kansas, said court being in session at its court room in the City of Topeka, the following proceeding, among others was had, and remains of record in words and figures as follows, to-wit:

46 In the Supreme Court of the State of Kansas, Saturday, November 11, 1916.

No. 20280.

THE CORN PRODUCTS REFINING CO., Appellee,

vs.

V. C. EDDY et al., Appellants.

Journal Entry of Judgment.

This cause comes on for decision, and thereupon it is ordered and adjudged that the judgment of the court below be reversed and that this cause be remanded with directions to enter judgment for the defendants. It is further ordered that the appellee pay the costs of this case in this court taxed at $—, and hereof let execution issue.

47 Be it further remembered, That on the same day, to-wit, the 11th day of November, 1916, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, the Court's written opinion in the above entitled case, with the syllabus attached thereto, which syilabus and opinion are in the words and figures as follows, to-wit:

48 No. 20280.

CORN PRODUCTS REFINING CO., Appellee,

v.

V. C. EDDY et al., Appellants.

Appeal from Shawnee County, Second Division. Reversed.

Syllabus by the Court.

MARSHALL, *J.*:

An injunction will not lie to restrain the State Board of Health from seeking to prevent, by legal means, the sale of a compound table syrup under the name "Mary Jane," where the label does not show the place of manufacture or production, and where it is not plainly stated on the package in which the syrup is offered for sale that it is a compound.

49 No. 20280.

The opinion of the court was delivered by

MARSHALL, *J.*:

The defendants appeal from a judgment enjoining them from interfering with the sale of "Mary Jane", a product manufactured by the plaintiff, and from attempting to compel the plaintiff to label "Mary Jane" a compound.

The plaintiff is engaged at Granite City and Argo, Illinois, in the manufacture of a table syrup composed of eighty-five per cent corn syrup or glucose, ten per cent molasses and five per cent sorghum. This syrup is sold under the name "Mary Jane" in cans labeled as follows:

"5 Pounds Net Weight.

Mary Jane.

Reg. U. S. Pat. Off.

Mary Jane is guaranteed by Corn Products Refining Co. to comply with the Food and Drug Act, June, 30, 1906. Registered under serial number 2317.

Mary Jane. A Table Syrup Prepared from Corn Syrup, Molasses and Pure Country Sorghum. Contains Sulphur Dioxide.

M'f'd by Corn Products Refining Co.

General Offices—New York, U. S. A."

The defendants constitute the Kansas State Board of Health. They contend that Mary Jane is misbranded in several particulars.

Two of these dispose of this case. The defendants claim that "Mary Jane" is a compound and that it is misbranded because the place of its manufacture or production is not shown, and because it is not specifically stated that "Mary Jane" is a compound. The defendants, through inspectors acting under the direction of defendant S. J. Crumbine, the Secretary of the Board, have notified the plaintiff's agents and representatives that "Mary Jane" is mis-
50 branded; that it is unlawful to sell it in Kansas as it is branded, and that those who sell it will be prosecuted.

Does the law require that this label shall contain a statement showing the place where "Mary Jane" is manufactured or produced? Part of section 3082 of the General Statutes of 1909 reads:

"Provided, That an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases: First, in the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with the statement of the place where said article has been manufactured or produced."

The defendants contend that "Mary Jane" is not a distinctive name for the article sold. It is not necessary to pass on that question at this time. We will assume, for the purposes of discussing the question now under consideration, that "Mary Jane" is a distinctive name and that the article sold thereunder is a mixture or compound, and is not an imitation of, or offered for sale under the distinctive name of, any other article. The label then, so far as these provisions are concerned, complies with the law; but the label contains no statement of the place where "Mary Jane" is manufactured or produced. The statute requires that this be shown, and the label does not conform to the statute unless it is shown.

Is it necessary that the words "compound" appear in the label? The statute covering this question reads:

"Second. In the case of articles labeled, branded or tagged so as to plainly indicate that they are compounds, imitations or blends, and the word 'compound,' 'imitation,' or 'blend,' as the case may be, is plainly stated on the package in which it is offered for sale." (Gen. Stat. 1909, §3082.)

51 The statement on the label showing the ingredients from which "Mary Jane" is manufactured apparently indicates that it is a compound table syrup. However, it is not plainly stated that it is a compound. So far as this label shows, the process of manufacture may be such that the article produced is an entirely new product manufactured from, and not one composed of, corn syrup, molasses and sorghum. The label says that "Mary Jane" is "Prepared from corn syrup, molasses and pure country sorghum", but "prepared from" does not necessarily mean "composed of" these ingredients. If "Mary Jane" is a compound, and the evidence shows

that it is, the labels on the cans in which it is offered for sale should plainly state that fact.

So long as neither of these provisions of the statute has been complied with, an injunction should not issue against the Board of Health to restrain it from using all legal means for the enforcement of the law.

It is not necessary to discuss the other questions presented by the defendants. The judgment of the district court is reversed and that court is directed to enter judgment for the defendants.

All the justices concurring except Dawson, J., who did not sit.

A true copy. Attest:

____ ____,

Clerk Supreme Court.

52 And afterwards, on the 29th day of November, 1916, there was filed in the office of the clerk of the Supreme Court of the State of Kansas, the Petition of the Appellee, for a rehearing herein, which petition for rehearing is in the words and figures as follows, towit:

53 Filed Nov. 29, '16. D. A. Valentine, Clerk Supreme Court.

In the Supreme Court of Kansas.

No. 20280.

CORN PRODUCTS REFINING COMPANY, Appellee,

vs.

V. C. EDDY et al., Appellants.

Petition for Rehearing.

R. W. Blair, C. A. Magaw, T. M. Lillard, Attorneys for Appellee.

54 In the Supreme Court of Kansas.

No. 20280.

CORN PRODUCTS REFINING COMPANY, Appellee,

vs.

V. C. EDDY et al., Appellants.

Petition for Rehearing.

Now comes Corn Products Refining Company, appellee herein, and petitions the court to grant it a rehearing in the above entitled cause, and as grounds therefor alleges.

I.

Prior to the commencement of this action the defendants wrote letters to the plaintiff's customers in Kansas advising them that Mary Jane "was not properly labeled as is required by the Kansas requirement, showing the percentages for this compound syrup. Your attention is invited to this matter at this time for the reason that we find a large amount of this product has been shipped into this state
55 which has not been properly labeled, and we will have to ask that the sale of this syrup in this state be discontinued until such time as it is properly labeled; also that such shipments as have already been made be taken up or be properly labeled. Copy of our food and drugs law is being sent you under separate cover. Your attention is invited to page 11, regulation 6, in the case of syrups; also to section 8 in the case of foods, under the provision, first, for mixtures and compounds which it will be seen require this syrup to be properly labeled as a compound and the word 'compound' to be upon the label. You will find, I believe, the federal requirements are the same." (Ab. 22-23.) (For copy of regulation 6, see ab. page 5.)

In addition to this, deputy food inspectors called upon persons dealing in Mary Jane, and warned them to the same effect. (See affidavit of F. C. Wood, Ab. 24.)

The plaintiff brought this action to enjoin the defendants from the above conduct and for the purpose of having it judicially determined whether the defendants, as the Board of Health, had the right and authority to continue in the a*obv*e conduct and to compel the plaintiff to state the percentages of the ingredients of which "Mary Jane" is composed, as required by regulation 6 referred to in the letter and set out on page 5 of the abstract, and to compel it to place the word "Compound" upon the label.

56 In their answer "defendants admit that it is claimed by the defendant S. J. Crumbine that said "Mary Jane" syrup, as labeled by the plaintiff, is misbranded because the label does not contain the word "compound," and because the label does not state the percentage of each ingredient of which said "Mary Jane" syrup is composed, but deny that the above are the only grounds on which it is claimed that "Mary Jane" syrup as labeled by the plaintiff is misbranded." (Ab. 16.)

It is further admitted by the answer that the defendants "assuming to act under and by virtue of the authority of regulations 3, 4 and 6, heretofore referred to and set out in paragraph 8 of plaintiff's amended petition, have notified plaintiff's agents and representatives, and the wholesale and retail merchants dealing in "Mary Jane" syrup in the State of Kansas, that said syrup as furnished to said wholesalers by plaintiff, is misbranded, and that it is unlawful to sell or offer the same for sale in the State of Kansas under said brand." (Ab. 171.)

From the foregoing it will be seen that the main issue in this case was whether the defendants should be enjoined from interfering with the sale of "Mary Jane" in this State upon the ground that the label did not comply with regulation 6.

The trial court found for the plaintiff, and rendered judg-
57 ment enjoining the defendants, among other things, "from threatening to or taking any steps whatever to intimidate the plaintiff's customers or other persons dealing in or selling said 'Mary Jane' syrup, so branded, within the State of Kansas because of regulation 6."

This court has set aside this judgment, including the part quoted, and ordered judgment for the defendants, because, in its opinion the label does not comply with Section 3082 of the General Statutes of 1909, in that it fails to "show the place of manufacture or production," and fails to plainly state that the syrup is a compound.

The court says: "So long as neither of these provisions of the statute has been complied with, an injunction should not issue against the Board of Health to restrain it from using all legal means for the enforcement of the law."

In this way the court dismisses the other and, as we think, principal question raised by the record, which is: Was the lower court right in enjoining the defendants from interfering with the sale of "Mary Jane" because the label does not state the percentage of the ingredients of the mixture contained in the can as required by regulation 6.

The defendants open their brief as follows: "This is an action brought to enjoin the Board of Health from enforcing certain of its rules and regulations." This shows that defendants considered that the principal question for decision is as we have stated.

58 If the label does not comply with Sec. 3082 of the statute, this fact certainly does not warrant the court in setting aside that part of the judgment enjoining the defendants from interfering with the sale of "Mary Jane" upon the ground that the label does not comply with regulation 6.

If the appellee complies with Section 3082, as construed by the court, the defendants will again, unless enjoined, immediately interfere with the sale of the product upon the ground that the label does not comply with regulation 6. Then the whole ground must be gone over again in order to get a decision upon the very question that is now raised. It is certainly to the interest of every one to have a decision now in order that there may be an end to this litigation. It is certainly unfair to put the appellee to the expense of going over this very ground again in another court.

The effect of the court's decision is to set aside a judgment enjoining the defendants from doing several things, part of which are unlawful, because one of the things they are doing is held to be lawful. Conceding the label to be bad because it does not contain the word "compound" or the place of manufacture, still the plaintiff is entitled to an injunction enjoining the defendants from attacking the sale of its product upon the ground that the label does not
59 state the percentage of the ingredients, and at least that part of the judgment so enjoining them should be permitted to stand, or a decision rendered showing why it should be set aside.

The appellants were advising the appellee's customers that the label did not comply with the law in two particulars: First, because

it did not state the percentage of the ingredients as required by regulation 6; and, second, because it did not contain the word "compound." The court has decided that the label does not comply with Section 3082 because it does not contain the word "compound," but it has not decided whether it fails to comply with the law because it does not state the percentage of the ingredients. Yet the court has set aside the entire judgment.

The appellants have no right to advise the public that the appellee's label does not comply with the law in a certain particular unless that statement is correct; and if the label does comply with the law in every particular, except that it fails to contain a statement of the place where it is manufactured or sold, or because it does not contain the word "compound," then the defendants have no right to advise the public that it fails to comply with the law in the other particular, which is that it did not state the percentage of the ingredients, and the appellee was entitled to an injunction restraining them from so stating either orally or in their letters. If we are correct in
60 this, the court should not have reversed the case, but, at most, should have done nothing more than modify the judgment, leaving that part stand which restrains the appellants from advising the public that the syrup is misbranded because the label does not state the percentage of the ingredients. If the judgment be so modified instead of reversed, then the appellee could state the place of manufacture upon the label or place the word "compound" thereon, as it saw fit, and proceed to do business without fear of future molestation from the appellants, upon the ground that the percentage of the ingredients is not stated upon the label.

Again, the appellee contended, and the question was fairly raised, that "Mary Jane" is a mixture known as an article of food under its own distinctive name, and is not an imitation of or offered for sale under the distinctive name of another article. The court assumes that this is true, but does not decide this question.

The appellee contends that it is entitled to an injunction restraining the appellants from advising appellee's customers either verbally or by letter that "Mary Jane is not properly labeled as is required by the Kansas requirements showing the percentages of the mixture," and from warning such persons that it is unlawful to sell this food unless the label complies with the requirements of regulation 6.

61 It further contends that the mere fact that, included within this warning, was the statement that the label did not comply with the law because it did not have the word "compound" printed thereon, does not entitle the appellants to judgment in their favor, but, in any event, only entitles them to a modification of the judgment entered by the District Court.

The appellee further contends that the court by setting aside the entire judgment without deciding the question as to whether the appellee is entitled to an order enjoining the appellants from advising the public that its product is misbranded because the label does not comply with regulation 6, has denied the appellee the equal protection of the law in violation of the Fourteenth Amend-

ment to the Constitution of the United States, and deprived appellee of its property without due process of law.

The appellee further contends that the order of the court directing the District Court to enter judgment for the appellants is an order setting aside the judgment of the said District Court rendered herein, enjoining the appellants from interfering with the sale of "Mary Jane" in the State of Kansas, upon the ground that the label thereof does not state the percentage of the ingredients of which the product is composed; that the order of the court in setting aside that part of the judgment of the District Court, denies
62 to this appellee the equal protection of the laws and takes from it its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

Appellee further contends that the judgment and decision of this court is repugnant to and in conflict with Section 8 of Article 1 of the Constitution of the United States, in that said judgment and decision constitute an unreasonable interference with interstate commerce, in which the appellee is engaged.

Appellee further contends that Section 3082 of the General Statutes of 1909, upon which the court bases its decision, as construed by the court in said decision, is void, for the reason that it is repugnant to and in conflict with Section 8 of Article 1 of the Constitution of the United States, in that said section, as interpreted and construed by this court, constitutes an unreasonable interference with interstate commerce, in which the appellee is engaged.

Appellee further contends that Section 3082 of the General Statutes of 1909, particularly as interpreted and construed by this court in this decision, is repugnant to and in conflict with Section 8 of the Federal food and drugs law, which is Chapter 3915 of Vol. 34 of the United States Statutes at Large, and is void.

Appellee further contends that Sec. 3082 of the General
63 Statutes of 1909, as construed by the court, is void because it denies to appellee the equal protection of the laws and takes its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

II.

The decision of the court is based upon Section 3082 of the 1909 General Statutes of Kansas.

Chapter 3915 of Vol. 34 of the United States Statutes at Large (34 U. S. Stat. at Lg. 768) went into effect June 30, 1906, and has been in force ever since said date, and was in force at all of the times referred to by the pleadings. Section 8 of the Federal act covers the same field covered by Section 3082 of the Kansas Statutes, and therefore that section of the Kansas law does not apply to appellee's business, because it is interstate and subject to Section 8 of the Federal law.

In McDermott v. Wisconsin, 228 U. S. 115, it is said:

"State legislation in regard to labeling articles in interstate com-

merce which are required to be branded under the federal pure food and drugs act is void so far as it interferes with the provisions of such act and imposes a burden on interstate commerce. * * * A state law on a subject within the domain of Congress must yield to the superior power of Congress. To the extent that it interferes with or frustrates the operation of the act of Congress a
64 state statute is void. Whether articles in interstate commerce have been branded in accordance with the terms of the food and drugs act is not for the state to determine but for the Federal courts in the manner indicated by Congress."

In St. Louis & San Francisco Railway Company v. Seale, 229 U. S. 156, it is said:

"Where the federal employers' liabiliy act is applicable, a state statute on the same subject is excluded by reason of the supremacy of the former."

While it is true that the factories where "Mary Jane" is manufactured are located at Granite City and Argo, Illinois, we believe the place of manufacture is stated on the label within the meaning of the federal law because the label gives the general offices of the company which manufactures the product.

If the label complies with the federal law it is not unlawful to sell "Mary Jane" in this State under that label because the federal food and drugs act "has taken possession of this field of regulation." While the State act is in the same language as the federal act, yet if it is so construed as to make that unlawful under the State law which is lawful under the federal law "the state act so construed is a wrongful interference with the exclusive power of Congress over interstate commerce," in which the appellee's syrup is shipped. (McDermott v. Wisconsin, 228 U. S. 127.)
65 In that case it is said that Congress manifestly is aiming at the contents of the package as it shall reach the consumer for whose protection the act primarily passed, and it is the printing upon the package which contains the article intended for consumption which is the subject matter of regulation (p. 130).

At page 132 it is said:

"Having in view the interpretation we have given the food and drugs act and applying the doctrine just stated to the instant case, how does the matter stand? When delivered for shipment and when received through the channels of interstate commerce the goods in question bore brands or labels which were supposed to comply with the requirements of the act of Congress. Whether the Secretary had power under the food and drugs act to make the regulations set out above, is not now before us. It is enough for the present purpose to say that, so far as this record discloses, it was undertaken in good faith to label the articles in compliance with the act of Congress, and, if they were not so labeled, by Section 2 provision is made for the enforcement of that act by criminal prosecution, and by Section 10 by proceedings in rem. Whether the labels complied with the federal law was not for the state to determine. This was a matter provided for by the act of Congress and to

be determined as therein indicated by proper proceedings in the federal courts."

In the present case the label is supposed to comply with the requirements of the Act of Congress. If it does comply with
66 that act, then it is not unlawful to sell "Mary Jane" under the brand complained of. Whether the label complied with the federal law is not for the appellants to determine nor for the state to determine. "This was a matter provided for by the act of Congress and to be determined as therein indicated by proper proceedings in the federal courts." Until the federal authorities have determined that the present label does not comply with the act of Congress, it must be presumed that it does comply with that act. If the federal authorities do not consider that the label complies with the federal law, they certainly would make some complaint about the label, which they have not done. It cannot be said that it is unlawful to sell "Mary Jane" under the present brand until it is first determined that the brand does not comply with the requirements of the federal law because, if it does comply with that law, the brand is sufficient and it cannot be attacked under Section 3082 of the General Statutes of 1909.

III.

In its decision the court says:

"We will assume for the purpose of discussing the question now under consideration that Mary Jane is a distinctive name, and that the article sold thereunder is a mixure or compound, and is not an imitation of or offered for sale under the distinctive name of any other article. The label, then, so far as these provisions are concerned, complies with the law; but the label contains no
67 statement of the place where Mary Jane is manufactured or produced. The statute required that this be shown, and the label does not conform to the statute unless it is shown. Is it necessary that the word 'compound' appear in the label? The statute covering this question reads. * * * The statement on the label showing the ingredients upon which Mary Jane is manufactured apparently indicates that it is a compound table syrup. However, it is not plainly stated that it is a compound. So far as this label shows, the process of manufacture may be such that the article produced is an entirely new product manufactured from and not composed of corn syrup, molasses and sorghum. The label says that Mary Jane is prepared from corn syrup, molasses and pure country sorghum, but prepared does not necessarily mean composed of these ingredients. If Mary Jane is a compound, and the evidence showed that it is, the labels on the cans in which it is offered for sale should plainly state that fact."

An examination of both the federal and state law shows that there was no attempt to compel manufacturers to brand their products. The law is aimed at the misbranding of products. That is, the purpose of the law is not to compel persons to brand their products, but to prevent them *for* misbranding them. There is nothing that

makes it unlawful to sell an article of food without any brand upon it.

Section 8 of the act defines misbranding in the case of
68 drugs and foods. That section, so far as applicable, reads:

"The term 'misbranding' as used herein shall apply to * * * articles of food, the container or labels of which shall bear any statement, design or device regarding such article or the ingredients or substances contained therein which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to the state in which it is manufactured or produced. That for the purposes of this act and article shall also be deemed to be misbranded * * * in the case of food: First, if it be an imitation of or offered for sale under the distinctive name of another article; second, if it be labeled or branded so as to deceive or mislead the purchaser or purport to be a foreign product when not so, or if the *condition* of the package as originally put up shall have been removed, in whole or in part, and other contents shall have been placed in such package, or if it fails to bear a statement on the label of the quantity or proportion of any morphine * * * or any derivative or preparation of any such substance contained therein, or which shall omit to state the presence of any artificial coloring matter contained therein; third, if in package form, and the contents are stated in terms of weight, measure or quantity, the net weight, measure or quantity is not plainly and correctly stated on the outside of the package; fourth, if the package containing it, or its label, shall bear any statement or design or device regarding the ingredients or the substance contained therein, which statement, design or device shall be false or misleading in any particular."

69 It is clear that "Mary Jane" is not misbranded under the statutory definition of that term, and it is not claimed that it is. There is no statutory direction that manufacturers of proprietary foods shall state the place of manufacture upon the label. Neither is there any declaration that they shall state the word "compound" thereon. The reference made to these terms is found in the proviso near the end of Section 8, which is a declaration of when an article shall not be deemed to be misbranded. That proviso reads:

"Provided that an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases: First, in the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with the statement of the place where said article has been manufactured or produced; second, in the case of articles labeled, branded or tagged so as to plainly indicate that they are compounds, imitations or blends, and the word 'compound,' 'imitation' or 'blend' as the case may be, is plainly stated on the package in which it is offered for sale; provided, that the term

'blend' as used herein shall be construed to mean a mixture of like substances, not excluding harmless coloring or flavoring ingredients used for the purpose of coloring and flavoring only."

70 The evident purpose of this proviso is to limit the application of the part declaring what shall constitute misbranding. An article branded as in accordance with the proviso might be misbranded except for it. But the proviso does not make those articles misbranded which are not misbranded within the statutory definition of that term.

"Mixture" and "compound" are synonymous terms. Webster's New International Dictionary defines "compound" as follows:

"That which is compounded or formed by the union or mixture of elements, ingredients or parts. A combination of simples, a composition."

The same work defines "mixture" as follows:

"Act of mixing or state of being mixed; as made by a mixture of ingredients. * * * That which results from mixing different ingredients; as to drink, a mixture of molasses and water."

It is clear, therefore, that "Mary Jane" is a mixture as used in the statute. If, however, it is a "blend" as well as a mixture or compound, it is not necessary, in any event, to place the word "compound" upon the label.

The statute expressly defines the term "blend" "to mean a mixture of like substances." Webster's International Dictionary defines blend as follows:

"A thorough mixture of things; blending; as a blended whiskey, wine or the like."

71 Under both of the above definitions the evidence showed that "Mary Jane" is a blend. That is, it is a mixture of like substances.

Doctor Wagner testified (Ab. 26):

"Mary Jane is a blend of 85 per cent corn syrup, 10 per cent molasses and 5 per cent sorghum. Molasses is made from sugar cane, and sorghum from sorghum cane."

At page 28 he further testified:

"I think there is very little, if any, pure sorghum sold. The blend is more satisfactory and more pleasant."

V. D. Kistler testified (Ab. 34):

"We handle Mary Jane syrup. * * * We have no pure country sorghum for sale. I don't think there is any material demand for it. All the syrups we handle, with one exception, are blends. The exception is maple syrup."

Doctor Wagner testified further (Ab. 35):

"When we put out the new sorghum mixture, Mary Jane, and we believed this to be a good product, the trade knows that that is a mixture, and furthermore the trade also knows that the Corn Products Refining Company is a manufacturer of corn syrup, and does put up blended syrups."

Professor Bailey, a witness called for the defendants, testified as follows:

"I know what effect five per cent of sorghum would have

72 upon a composition composed of 85 per cent corn syrup, 10 per cent molasses, and 5 per cent sorghum. It would act simply as a flavor."

If "Mary Jane" is a blend, and the evidence shows it is, then in no event was it necessary to place the word "compound" on the label; neither was it necessary to do so if the article belongs to the distinctive name class, as the court assumes it does.

The field covered by the pure food law is new. The statute has not been judicially construed. Until the court settles the questions raised by the record in this case, disputes will continue to arise and litigation follow.

We respectfully submit that the appellee is entitled to a rehearing and a decision upon the questions raised by the record and submitted to the court.

R. W. BLAIR,
C. A. MAGAW,
T. M. LILLARD,
Attorneys for Appellee.

73 Be it further remembered, That on Wednesday, the 13th day of December, 1916, the same being one of the regular judicial days of the July, 1916, Term of the Supreme Court of the State of Kansas, said Court being in session at its court room in the City of Topeka, the following proceeding, among others was had, and remains of record in words and figures as follows, to-wit:

74 In the Supreme Court of the State of Kansas, Wednesday, December 13, 1916.

No. 20280.

CORN PRODUCTS REFINING CO., Appellee,

vs.

V. C. EDDY et al., Appellants.

Journal Entry Denying Petition for a Rehearing.

Noe comes on for decision the petition for a rehearing of this cause, and thereupon it is ordered that said petition for a rehearing be denied.

75 STATE OF KANSAS,
Supreme Court, ss:

I, D. A. Valentine, Clerk of the Supreme Court of the State of Kansas, do hereby certify that the above and foregoing is a full, true, correct and complete transcript of the record and proceedings in the above entitled case, and also of the Opinion of the Court ren-

dered thereon, as the same now appear on file and of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at my office in Topeka, Kansas this 24th day of January, A. D. 1917.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk Supreme Court of Kansas.

76 And afterward, On the 12th day of January, 1917, there was presented to the Chief Justice of the Supreme Court of the State of Kansas, a Petition for a Writ of Error, which Petition was allowed.

Here follow:
Original Petition for Writ of Error;
The Original Assignments of Error;
A copy of the Bond for Appeal;
Original Writ of Error;
Original Citation and Proof of Service thereof.

77 In the Supreme Court of the United States.

No. —.

CORN PRODUCTS REFINING COMPANY, Plaintiff in Error,

vs.

C. V. EDDY, B. J. ALEXANDER, C. H. LERRIGO, CLAY C. COBURN, W. O. Thompson, O. D. Walker, J. S. Cummings, Jesse Thomas Orr, Walter D. Hunt, Charles D. Welch, and S. J. Crumbine, Defendants in Error.

Petition for Writ of Error, Assignment of Errors, and Prayer.

The said Corn Products Refining Company, plaintiff in error, prays that a writ of error may be issued out of this court directed to the Supreme Court of the State of Kansas, to review the final judgment of said court in a suit wherein the plaintiff in error was appellee and the said defendants in error were appellants, and to that end plaintiff in error presents the following

Assignment of Errors.

In its said judgment the Supreme Court of the State of Kansas erred:

I.

In reversing the judgment of the District Court of Shawnee county, Kansas and thereby deciding in favor of the authority of the defendants who are members and officers of, and who con-

stitute the Kansas State Board of Health, to make and enforce, as to articles of food sold in interstate commerce, certain rules and regulations under the authority of chapter 266 of the Kansas session laws of 1907 as amended by chapter 184 of the Kansas session laws of 1909, particularly sections 3 and 8 thereof, which said rules and regulations are in words and figures as follows, to-wit:

Regulation 3.

Analyses.

Section 4.

A. If it appears from examination or analysis that the provisions of the Kansas food and drugs law have been violated, the
78 secretary of the State Board of Health shall give notice to the county attorney of the county where the sample was taken, as prescribed. The results of such examinations may be published in the Bulletin of the Kansas State Board of Health, at such times as the secretary of the State Board of Health may direct.

Regulation 4.

Publication.

Section 5.

B. (*a*) When a judgment of the courts shall have been rendered there may be a publication of the findings of the examiner or analyst, together with the findings of the court.

(*b*) This publication may be made in the form of circulars, notices, or bulletins, as the secretary of the State Board of Health may direct.

(*c*) If appeal be taken from the judgment of the court before such application, notice of the appeal shall accompany the publication.

Regulation 6.

C. (*b*) Manufacturers of proprietary foods are required to state upon the label the names and percentages of the materials used, so far as is necessary to secure freedom from adulteration and misbranding: (1) In the case of syrups, the principal label shall state definitely, in conspicuous letters, the percentage of each ingredient, in the case of compounds, mixtures, imitations, or blends. When the name of the syrup includes the name of one or more of the ingredients, the preponderating ingredient shall be named first.

said plaintiff in error having in said suit drawn in question the validity of said sections 3 and 8 of chapter 266 of the Kansas session laws of 1907, as amended by chapter 184 of the Kansas laws of 1909, particularly as construed by the defendants, as applied to

articles of food sold in interstate commerce, and having in said suit drawn in question the validity of said regulations 3, 4 and 6, as applied to articles of food sold in interstate commerce, particularly as construed by the defendants, and having in said suit drawn in question the validity of the authority of the defendants to make and enforce said rules and regulations as to articles of food sold in interstate commerce, on the ground that said statutes, rules and regulations and authority as applied to such articles of food, are repugnant to the fourteenth amendment to the constitution of the United States, and on the further ground that they are repugnant to and in conflict with section 8 of article 1 of the constitution of the United States,

and on the further ground that they are repugnant to and in
79 conflict with the act of Congress of June 30, 1906, c. 3915, (34 Stat. 768) commonly known as the Federal Food and Drugs Act, in that said laws, rules, regulations and authority as interpreted and construed by the defendants and the Supreme Court of Kansas deprive persons of property without due process of law and deny to persons within the State of Kansas the equal protection of the law, and in that they constitute an unreasonable interference with interstate commerce in which the plaintiff in error is engaged, and in that they are repugnant to and in conflict with sections 3 and 4 of the said act of Congress of June 30, 1906, when enforced against articles of food sold in interstate commerce.

II.

In reversing the judgment of the District Court of Shawnee county, Kansas, and thereby deciding in favor of the right and authority of the defendants under said regulations 3, 4 and 6 to prevent the plaintiff in error from importing and selling in interstate commerce in the state of Kansas a proprietary article of food manufactured by it at Granite City and Argo, Illinois, which does not contain any added poisonous or deleterious ingredients and which is a mixture known as an article of food under its own distinctive name of "Mary Jane" and which is not an imitation of or offered for sale under the distinctive name of another article of food, when branded with the following label:

5 Pounds Net Weight.

Mary Jane.

Reg. U. S. Pat. Off.

Mary Jane is guaranteed by Corn Products Refining Co. to comply with the Food and Drugs Act, June 30, 1906. Registered under serial number 2317.

Mary Jane. A table syrup prepared from corn syrup, molasses and pure country sorghum. Contains sulphur dioxide.

M'f'd by

Corn Products Refining Co.

General Offices—New York, U. S. A.

80 on the following grounds:

1. That the label does not state the percentage of each ingredient of which said Mary Jane is composed, and,

2. That the label does not contain the word "compound," said plaintiff in error having in said suit drawn in question the validity of said regulations and of said authority exercised by the defendants thereunder on the ground of their being repugnant to the fourteenth amendment to the constitution of the United States, and on the further ground that they are repugnant to and in conflict with section 8 of article 1 of the constitution of the United States, and on the further ground that they are repugnant to and in conflict with the said act of Congress of June 30, 1906, commonly known as the Federal Food and Drugs Act, when applied to and enforced against such articles of food sold under their own distinctive name in interstate commerce.

III.

In deciding that an injunction should not issue against the defendants to restrain them from interfering with the importation and sale in interstate commerce of an article of food manufactured by the plaintiff in error at Granite City and Argo, Illinois, which said food does not contain any added poisonous or deleterious ingredients and which said food is a mixture known as an article of food under its own distinctive name of "Mary Jane" and which said food is not an imitation of or offered for sale under the distinctive name of another article, when said food is branded with the label heretofore set out in assignment No. 2, by notifying the plaintiff's customers or other persons within the State of Kansas, or elsewhere, that said "Mary Jane" is misbranded, and by attempting to compel the plaintiff to label the said "Mary Jane" a compound, and by threatening to prosecute or by taking any steps whatever to
81 intimidate the plaintiff's customers or other persons dealing in or selling said "Mary Jane" so branded within the State of Kansas, because the label does not state definitely in conspicuous letters the percentage of each ingredient of which said Mary Jane is composed, thereby deciding in favor of the authority of the defendants to prevent the importation and sale of said "Mary Jane" in interstate commerce in the State of Kansas when so branded, the plaintiff in error having in said suit drawn in question the validity of the authority of the defendants to so prevent the importation and sale in interstate commerce of said "Mary Jane" on the ground of it being repugnant to the said fourteenth amendment to the con-

stitution of the United States and to section 8 of article 1 of the constitution of the United States, and to the said act of Congress of June 30, 1906, known as the Federal Food and Drugs Act.

IV.

In setting aside that part of the judgment of the District Court of Shawnee county, Kansas, enjoining the defendants in error from interfering with the importation and sale of said "Mary Jane" under said brand in interstate commerce in the State of Kansas, upon the ground and for the reason that said brand does not state the percentage of each ingredient of which said "Mary Jane" is composed thereby deciding in favor of the authority of the defendants to prevent the importation and sale in interstate commerce in the State of Kansas of said "Mary Jane" under said brand because the percentage of the ingredients is not stated thereon, the plaintiff in error having in said suit drawn in question the validity of said authority on the ground of its being repugnant to the fourteenth amendment to the constitution of the United States and to section 8 of article 1 of the constitution of the United States and to the act of Congress of June 30, 1906, commonly known as the Federal Food and Drugs Act.

82 V.

In reversing the judgment of the District Court of Shawnee county, Kansas, and thereby deciding in favor of the authority of the defendants under and by virtue of said regulations 3, 4 and 6 to notify the plaintiff's agents and representatives and the wholesale and retail merchants dealing in said "Mary Jane" syrup in the State of Kansas that said syrup as furnished to said wholesale merchants by the plaintiff in error is misbranded in the particulars hereinbefore specified and that it is unlawful to sell or offer the same for sale in the state of Kansas under the brand hereinbefore set out in assignment No. 2, it not appearing from any examination made by the Bureau of Chemistry of the Department of Agriculture, or under the direction or supervision of such Bureau, or by any other competent federal or state authority, that said "Mary Jane" is adulterated or misbranded within the meaning of either the said act of Congress or the laws of the State of Kansas, and no judgment of any court, state or federal, having been rendered adjudging that said product when so branded is adulterated or misbranded, the said plaintiff in error having in said suit drawn in question the validity of said regulations and the authority exercised thereunder, on the ground of their being repugnant to the fourteenth amendment to the constitution of the United States, and on the further ground of their being repugnant to and in conflict with section 8 of article 1 of the constitution of the United States, and on the further ground of their being repugnant to and in conflict with the said act of Congress of June 30, 1906, commonly known as the Federal Pure Food and Drugs Act.

VI.

In reversing the judgment of the District Court of Shawnee county, Kansas and thereby deciding in favor of the authority which the defendants claim they have the power to exercise
83 under and by virtue of sections 3 and 8 of chapter 266 of the Kansas session laws of 1907, as amended by chapter 184 of the laws of 1909, and under and by virtue of said rules and regulations, by preventing the importation and sale in the State of Kansas of the said proprietary articles of food manufactured and sold under the distinctive name of "Mary Jane" when branded as hereinbefore set out, by notifying the agents and representatives of said plaintiff in error and the wholesale and retail merchants dealing in said "Mary Jane" in the State of Kansas that said syrup as furnished to said wholesale merchants by the plaintiff is misbranded because the label does not state the percentage of each ingredient of which the said "Mary Jane" is composed and because the label does not contain the word "compound," and that it is unlawful to sell or offer the same for sale in the State of Kansas under said brand, said plaintiff in error having in said suit drawn in question the validity of said authority on the ground of its being repugnant to the fourteenth amendment to the constitution of the United States, and on the further ground that it is repugnant to and in conflict with section 8 of article 1 of the constitution of the United States, and on the further ground that it is repugnant to and in conflict with the act of Congress of June 30, 1906, commonly known as the Federal Food and Drugs Act.

VII.

In deciding in favor of the validity of the authority of the defendants claimed and exercised by them under chapter 266 of the Kansas session laws of 1907, as amended by chapter 184 of the laws of 1909, to prevent the importation and sale in the state of Kansas of the said proprietary article of food manufactured by the plaintiff and known by the distinctive name of "Mary Jane," which is not the name of any other article of food, and which said product contains nothing deleterious or injurious to health, where the label does not show the place of manufacture or production and
84 where it is not plainly stated on the package in which the article is offered for sale that it is a compound, by notifying the manufacturers, agents and representatives of the plaintiff in error, and the wholesale and retail merchants dealing in said "Mary Jane" in the State of Kansas, that said syrup as furnished to said wholesale merchants by the plaintiff in error is misbranded, and that it is unlawful to sell or offer the same for sale in the State of Kansas under said brand, said plaintiff in error having in said suit drawn in question the validity of said statute and authority on the ground of their being repugnant to the fourteenth amendment to the constitution of the United States, and on the further ground

that it is repugnant to and in conflict with section 8 of article 1 of the constitution of the United States, and on the further ground that it is repugnant to and in conflict with the act of Congress of June 30, 1906, commonly known as the Federal Food and Drugs Act.

VIII.

In reversing the judgment of the District Court of Shawnee county, Kansas, and thereby deciding in favor of the authority of the defendants to prevent the importation and sale in the state of Kansas of a table syrup manufactured by the plaintiff in error at Granite City and Argo, Illinois, and distributed and sold in the state of Kansas under the label set out in assignment No. 2, on the ground that such label does not show the place of manufacture or production and does not plainly state that the syrup is a compound, said plaintiff in error having in said suit drawn in question the validity of said authority on the ground of its being repugnant to the fourteenth amendment to the constitution of the United States and on the ground of its being repugnant to and in conflict with section 8 of article 1 of the constitution of the United States, and on the ground of its being repugnant to and in
85 conflict with the act of Congress of June 30, 1906, chapter 3915, 34 Stat. 768.

IX.

In reversing the judgment of the District Court of Shawnee county, Kansas and thereby deciding that the defendants have the lawful right and authority under the laws of the state of Kansas to notify the representatives of plaintiff in error and persons selling and offering for sale the food product known as "Mary Jane," manufactured by the plaintiff in error and sold in interstate commerce in the state of Kansas, that it is unlawful to sell said food product in the state of Kansas and that persons selling it will be prosecuted for so doing unless the plaintiff in error attaches in a conspicuous place on the outside of each can of "Mary Jane" imported into and offered for sale within the state of Kansas a label with the word "compound" printed thereon and stating definitely in conspicuous letters in addition thereto the percentage of each ingredient of which said "Mary Jane" is composed, and thereby further deciding in favor of the right and authority of the defendants to declare to plaintiff's agents and representatives and to persons dealing in said "Mary Jane" in the state of Kansas that they will be arrested and prosecuted if they sell or offer the said "Mary Jane" for sale in the state of Kansas under the brand hereinbefore set out in assignment No. 2 and thereby further deciding in favor of the validity of the authority of the defendants to write letters to merchants to whom the plaintiff in error is and has been furnishing large quantities of "Mary Jane" and to retail merchants to whom said wholesale merchants have been supplying said "Mary Jane" and to retail merchants who have been selling the same to consumers for domestic use, advising such merchants, dealers and

persons that they will be prosecuted by the defendants for selling or for offering for sale the said "Mary Jane" unless and until
86 the same shall have been branded and labeled by printing the word "compound" and the percentage of each ingredient of which said "Mary Jane" is composed upon the label, and thereby deciding the exercise of such authority and such conduct to be due process of law under the fourteenth amendment to the constitution of the United States, and deciding that the exercise of such authority and such conduct were not repugnant to section 1 of article 14 of the amendments to the constitution of the United States and the exercise of such authority and conduct were not repugnant to section 8 of article 1 of the constitution of the United States, and that such authority and conduct were not repugnant to and in conflict with the act of Congress of June 30, 1906, chapter 3915, 34 Stat. 768, the plaintiff in error having in said suit drawn in question the validity of such authority and conduct exercised thereunder on the ground of their being repugnant to said fourteenth amendment to the constitution of the United States, and on the further ground of their being repugnant to and in conflict with section 8 of article 1 of the constitution of the United States, and on the further ground of their being repugnant to and in conflict with said act of Congress of June 30, 1906, known as the federal food and drugs act.

X.

In reversing the judgment of the District Court of Shawnee county, Kansas, thereby deciding in favor of the authority of the defendants to prevent the plaintiff in error from importing into the state of Kansas and selling therein under the brand or label set out in assignment No. 2 hereof an article of food manufactured by it at Granite City and Argo, Illinois which does not contain any added poisonous or deleterious ingredients and which is a mixture known as an article of food under its own distinctive name of "Mary Jane" and which is not an imitation of or offered for sale under the distinctive name of another article of food,
87 on the ground that it is not properly branded, said defendants in error having claimed and exercised said authority under chapter 266 of the Kansas session laws of 1907 as amended by chapter 184 of the Kansas session laws of 1909, the said plaintiff in error having in said suit drawn in question the validity of such authority on the ground of its being repugnant to the fourteenth amendment to the consitution of the United States and on account of its being repugnant to section 8 of article 1 of the constitution of the United States and on account of its being repugnant to the act of Congress of June 30, 1906, chapter 3915, 34 Stat. 768, known as the federal food and drugs act.

For which errors the plaintiff in error, Corn Products Refining Company, prays that the said judgment of the Supreme Court of the state of Kansas, dated November 11, 1916, be reversed and

judgment rendered in favor of Corn Products Refining Company, and for costs.

R. W. BLAIR,
C. A. MAGAW,
T. M. LILLARD,
Attorneys for Corn Products Refining Company.

STATE OF KANSAS,
Supreme Court, ss:

Let the writ of error issue upon the execution of a bond in the sum of $500.00.
Dated Jan'y 12, 1917.

W. A. JOHNSTON,
Chief Justice of the Supreme Court of Kansas.

88 [Endorsed:] No. —. In the Supreme Court of United States. Corn Products Refining Company, Plaintiff, vs. V. C. Eddy et al., Defendant-. Petition for writ of error, Assignment of errors, and Prayer. Blair, Magaw & Lillard, Att'ys for Plaintiff, Topeka, Kansas. Filed Jan. 12, 1917. D. A. Valentine, Clerk Supreme Court.

89 In the Supreme Court of the United States.

No. —.

CORN PRODUCTS REFINING COMPANY, Plaintiff in Error,

vs.

V. C. EDDY et al., Defendants in Error.

Bond.

Know all men by these presents, that we, Corn Products Refining Company, a corporation, as principal, and Ernest E. Nold as surety, are held and firmly bound unto the defendants in the sum of $500.00, to the payment of which well and truly to be made we bind ourselves jointly and severally and all and each of our heirs, executors and administrators firmly by these presents.

The condition of this obligation is such that whereas the above named Corn Products Refining Company has presented a writ of error to the Supreme Court of the United States to reverse the judgment rendered by the Supreme Court of the State of Kansas in an action wherein it was appellee and the said defendants were appellant-.

Now, therefore, if the said Corn Products Refining Company shall prosecute its said writ of error to effect and answer all costs and dam-

ages if it shall fail to make good its plea, then this obligation shall be void, otherwise to remain in full force and effect.

CORN PRODUCTS REFINING COMPANY,
By R. W. BLAIR,
C. A. MAGAW,
T. M. LILLARD,
Its Attorneys.
ERNEST E. NOLD, *Surety.*

Approved by me this 12th day of January, 1917.
W. A. JOHNSTON,
Chief Justice of the Supreme Court of Kansas.

89½ [Endorsed:] 20280. In the Supreme Court of the United States. Corn Products Refining Co., Pl'ff, v. V. C. Eddy et al., Defendants. Bond. Blair, Magaw & Lillard, Attorneys for Plaintiff, Topeka, Kansas. Filed Jan. 12, 1917. D. A. Valentine, Clerk Supreme Court.

90 In the Supreme Court of the United States.

No. —.

CORN PRODUCTS REFINING COMPANY, Plaintiff in Error,

vs.

V. C. EDDY et al., Defendants in Error.

Writ of Error.

The President of the United States to the Supreme Court of the State of Kansas, Greeting:

Because in the proceedings and in the final judgment rendered by you in a suit by the Corn Products Refining Company, a corporation, appellee, against V. C. Eddy, B. J. Alexander, C. H. Lerrigo, Clay C. Coburn, W. O. Thompson, O. D. Walker, J. S. Cummings, Jesse Thomas Orr, Walter D. Hunt, Charles D. Welch and S. J. Crumbine, appellants, reversing the judgment against said appellants theretofore rendered by the District Court of Shawnee county, Kansas, in which suit was drawn in question by the said Corn Products Refining Company, appellee, the validity of a statute of and an authority exercised under the state of Kansas, on the ground of their being repugnant to the constitution and laws of the United States, and your decision was in favor of their validity, a manifest error, as by its complaint appears has happened to the great damage of the said Corn Products Refining Company.

We, being willing that error, if any has been, should be duly corrected and justice done to the said parties in this behalf, do command you that under your seal you send the records and proceedings in said suit with all things concerning it to the Supreme Court of the

United States together with this writ so that you have the said record and proceedings at Washington on or before the 11 day of February, A. D. 1917, in said Supreme Court, to the end that the said
91 record and proceedings being inspected said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Edward Douglass White, Chief Justice of the United States, this 12 day of January, 1917. Issued by me at my office in the City of Topeka, Kansas, and the seal of the District Court of the United States for the District of Kansas affixed thereto by me.

[Seal of District Court U. S., District of Kansas, 1861.]

MORTON ALBOUGH,
Clerk of the District Court of the United States for the District of Kansas, First Division.

Allowed:
W. A. JOHNSTON,
Chief Justice of the Supreme Court of the State of Kansas.

92 [Endorsed:] No. 20280. In the Supreme Court of United States. Corn Products Refining Co., Plaintiff, vs. V. C. Eddy et al., Defendant-. Writ of Error. Blair, Magaw & Lillard, Att'ys for Plaintiff, Topeka, Kansas. Filed Jan. 13, 1917. D. A. Valentine, Clerk Supreme Court.

93 In the Supreme Court of the United States.

No. —.

CORN PRODUCTS REFINING COMPANY, Plaintiff in Error,

vs.

V. C. EDDY et al., Defendants in Error.

Citation.

United States of America to V. C. Eddy, B. J. Alexander, C. H. Lerrigo, Clay C. Coburn, W. O. Thompson, O. D. Walker, J. S. Cummings, Jesse Thomas Orr, Walter D. Hunt, Charles D. Welch, and S. J. Crumbine:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held in Washington, D. C., within thirty days from the date hereof pursuant to a writ of error filed in the clerk's office of the Supreme Court of the State of Kansas wherein Corn Products Refining Company is plaintiff in error and you are the defendants in error, to show cause, if any there be, why

the judgment rendered against said plaintiff in error as in said writ mentioned should not be corrected, and why speedy justice should not be done in that behalf.

Witness the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States, this 12th day of January, 1917.

W. A. JOHNSTON,
Chief Justice of the Supreme Court of the State of Kansas.

Service of the above citation accepted January 12, 1917.

S. M. BREWSTER,
Att'y Gen.;
J. P. COLEMAN,
Asst. Att'y Gen.,
Attorney- for Defendants in Error.

Attest:

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk Supreme Court of Kansas.

94 [Endorsed:] No. —. In the Supreme Court of United States. Corn Products Refining Co., Plaintiff, vs. V. C. Eddy et al., Defendant-. Citation. Blair, Magaw & Lillard, Attorneys for Plaintiff, Topeka, Kansas. Filed Jan. 12, 1917. D. A. Valentine, Clerk Supreme Court.

95 STATE OF KANSAS,
Supreme Court, ss:

I, D. A. Valentine, Clerk of the Supreme Court of the State of Kansas do hereby certify that there was lodged with me as such clerk on the 12th day of January, 1917, in the above entitled case,

1. The original Bond of which a copy is herein set forth.
2. Twelve copies of Writ of Error, as herein set forth, one for each defendant and one to file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at my office in Topeka, Kansas, this 24th day of January, A. D. 1917.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk Supreme Court of Kansas.

96 THE UNITED STATES OF AMERICA,
Supreme Court of Kansas, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified tran-

script of the complete record and proceedings in the within entitled case, together with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the seal of the said Supreme Court of Kansas in the City of Topeka, this 24th day of January, A. D. 1917.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk Supreme Court of Kansas.

Endorsed on cover: File No. 25,742. Kansas Supreme Court. Term No. 912. Corn Products Refining Company, plaintiff in error, vs. V. C. Eddy, B. J. Alexander, C. H. Lerrigo et al. Filed February 2d, 1917. File No. 25,742.

No. 1119

JOHN PRODUCTS REFINING COMPANY, PLAINTIFF IN ERROR,

vs.

T. C. EDDY, R. S. ALEXANDER, C. H. LERRIGO, ET AL., DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

BRIEF FOR PLAINTIFF IN ERROR.

R. W. BLAIR,
C. A. MCCAW,
T. M. LILLARD,
Attorneys for Plaintiff in Error.

(25,742)

SUBJECT INDEX.

CASES CITED.

(25,742)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1918.

CORN PRODUCTS REFINING COMPANY, PLAINTIFF IN ERROR,

vs.

V. C. EDDY, B. J. ALEXANDER, C. H. LERRIGO, *ET AL.* DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

STATEMENT.

This proceeding was commenced in the District Court of Shawnee County, Kansas, on May 2, 1913, as a suit in equity, by the plaintiff in error against the defendants in error, who constitute the Kansas State Board of Health, to enjoin them from enforcing certain requirements as to branding against the plaintiff's table syrup, known as "Mary Jane". The general offices of the plaintiff are in New York City. This syrup is manufactured at its factories in Granite City and Argo, Illinois, and the plaintiff had built up a large and profitable market for it in Kansas.

On April 7, 1913, the defendants had sent out warning letters to all wholesale customers of the plaintiff who import this syrup into Kansas, which letters were in the following form: (Rec. 22.)

TOPEKA, KAN., April 7, 1913.

Ryley-Wilson Gro. Co., Kansas City, Mo.

GENTLEMEN: This department is in receipt of the information from dealers in this state that they have had on hand the

"Mary Jane" syrup which has been sold them by you and which is not properly labeled as is required by the Kansas requirements, showing the percentages of the ingredients for this compound syrup. Your attention is invited to this matter at this time for the reason that we find a large amount of this product has been shipped into this state, which has not been properly labeled, and we will have to ask that the sale of this syrup in this state be discontinued until such time as it is properly labeled. Also that such shipments as have already been made be taken up or be properly labeled.

Copy of our food and drug law is being sent you under separate cover. Your attention is invited to page 11, regulation 6, in the case of syrups; also to section 8 in the case of foods, under the provision, 1st, for mixtures and compounds, which it will be seen requires this syrup to be properly labeled as a compound and the word "compound" to be upon the label.

You will find, I believe, the federal requirements are the same. We will ask you to advise us at once what is done in this matter.

Yours very truly, J. F. TILFORD,
Assistant Chief Food and Drug Inspector.

Verbal notices of a similar nature, coupled with threats of arrest, were given by traveling representatives of the defendants. No judgment of any court holding that the syrup was misbranded had ever been rendered and no judicial proceeding of any kind against the syrup had ever been instituted by the defendants.

As a result of this action by the defendants, there was not only a cessation of orders for the syrup, but Kansas dealers began to return shipments already purchased and the plaintiff's large and profitable market for "Mary Jane" was practically destroyed. To protect against further inroads on its business from these methods and to contest the right and authority of the defendants to enforce their requirements as to the manner in which the syrup must be branded or labeled this action was commenced.

THE KANSAS STATUTE.

The Kansas food and drugs act is chapter 35, General Statutes of 1909. (Also appears as Chap. 32, Gen Stat. 1915, a later compilation.)

Section 1 of the act forbids any person to manufacture within the state of Kansas, and section 2 forbids any person to sell, keep for sale, or offer for sale within the state, any article of food which is adulterated or misbranded.

Section 3 provides that "the State Board of Health is authorized and directed to make and publish uniform rules and regulations not in conflict with the laws of this state for carrying out the provisions of this act."

Section 8 provides that for the purposes of the act food shall be considered misbranded—

"First, if it be an imitation of or offered for sale under the distinctive name of another article.

"Second, if it be labeled or branded so as to deceive or mislead the purchaser. . . .

"Fourth, If the package containing it, or its label, shall bear any statement, design, or device regarding the ingredients of the substance contained therein, which statement, design, or device shall be false or misleading in any particular.

"*Provided*, That an article of food which does not contain any added poisonous or deleterious ingredient shall not be deemed to be adulterated or misbranded in the following cases:

"First, In the case of mixtures or compounds which may be now, or from time to time hereafter, known as articles of food under their own distinctive name, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with the statement of the place where said article has been manufactured or produced;

"Second, In the case of articles labeled, branded, or tagged so as to apparently indicate that they are compounds, imitations, or blends, and the word compound, imitation, or blend, as the case may be, is plainly stated on the package in which it is offered for sale. . . .

"*Provided*, That nothing in this act shall be construed as requiring or compelling proprietors or manufacturers of proprietary foods which contain no unwholesome ingredients to disclose their trade formula, except in so far as the provisions of this act or the rules and regulations of the State Board of Health may require to secure freedom from adulteration or misbranding."

Section 24 provides that the Board of Health "is hereby authorized and directed" to make such sanitary rules and regulations as are necessary in food and drugs inspection, and to carry out the provisions of the act.

THE PLEADINGS.

The plaintiff's bill (called a petition under the Kansas practice) alleged, in substance, that the plaintiff manufactures at Granite City and Argo, Illinois, a proprietary syrup which is known and sold under the distinctive name of "Mary Jane",

and that each can is branded on the outside at the factory with a label which bears the following words and figures:

5 Pounds, Net Weight.

Mary Jane.

Reg. U. S. Pat. Off.

Mary Jane is guaranteed by Corn Products Refining Co. to comply with the Food and Drugs Act, June 30, 1906. Registered under serial number 2317.

Mary Jane, a table syrup prepared from corn syrup, molasses and pure country sorghum. Contains sulphur dioxide.

M'f'd by Corn Products Refining Co.

General Offices: New York, U. S. A.

That "Mary Jane" is a proprietary food product and has always been sold under the distinctive name of "Mary Jane", which is not the name of any other article of food, and that it contains nothing deleterious or injurious to health; that plaintiff's representatives and agents solicit sales of "Mary Jane" in Kansas from wholesale merchants and forward the orders to Granite City and Argo, Illinois, where the orders are subject to the approval of plaintiff, and that plaintiff has never carried a stock of said "Mary Jane" in Kansas; that the name "Mary Jane" is protected under trade marks in the United States.

It is further alleged that defendant Board of Health has enacted and published certain regulations, among them Regulation 6, which reads as follows:

Regulation 6.

C. (b) Manufacturers of proprietary foods are required to state upon the label the names and percentages of the materials used, so far as is necessary to secure freedom from adulteration and misbranding: (1) In the case of syrups, the principal label shall state definitely, in conspicuous letters, the percentage of each ingredient, in the case of compounds, mixtures, imitations, or blends. When the name of the syrup includes the name of one or more of the ingredients, the preponderating ingredient shall be named first. . . .

"12. Plaintiff further alleges that said regulation No. 6 is void for the further reason that it is repugnant to section 8 of the Kansas food and drugs law, which provides: 'That an article of food which does not contain any added poisonous or delete-

rious ingredients shall not be deemed to be adulterated or misbranded in the following cases: First, in the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with the statement of the place where said article has been manufactured or produced'; and which further provides: 'That nothing in this act shall be construed as requiring or compelling proprietors or manufacturers of proprietary foods, which contain no unwholesome ingredients, to disclose their trade formulas, except in so far as the provisions of this act, or the rules and regulations of the State Board of Health, may require to secure freedom from adulteration or misbranding.'

"13. Plaintiff further alleges that said section 3 of the Kansas food and drugs law, and that part of section 8 thereof which attempts to confer power upon The Kansas State Board of Health to make rules and regulations, and said regulations 3, 4 and 6 (particularly as construed by the defendants) are void for the further reason that they are repugnant to, and in conflict with, the act of Congress of June 30, 1906, C. 3915 (34 Stat. 768), hereinafter called the federal food and drugs act, and are especially repugnant to section 8 thereof, which contains the identical provision hereinbefore quoted from section 8 of the Kansas food and drugs law, with the exception that the words 'or the rules and regulations of the State Board of Health' are omitted.

"14. Plaintiff further alleges that, independently of the operation and effect of the federal food and drugs act, section 3 and that part of section 8, hereinbefore specified, of the Kansas food and drugs law, and said regulations 3, 4 and 6, particularly as interpreted and construed by the defendants, are void, for the further reason that they are in conflict with section 1 of article 14 of the amendments to the constitution of the United States, in that they deprive persons of property without due process of law, and deny to persons within the state of Kansas the equal protection of the laws, and in that, as construed by the Board of Health, and its executive officer, the defendant, S. J. Crumbine, the said Kansas laws and the said rules and regulations arbitrarily require manufacturers of proprietary foods, without compensation and without due process of law, whether such proprietary food contains any poisonous or deleterious elements or ingredients, to disclose the formulae by which they are compounded and the ingredients and portions thereof, which embody valuable trade secrets, and that if said sections and said regulations are enforced against the plaintiff, as interpreted and construed by the defendants, plaintiff will be deprived of its property without due process of law and will be denied the equal protection of the laws, contrary to the said amendments.

"15. Plaintiff further alleges that said section 3 and said part of section 8 of the Kansas food and drugs law, and said regulations 3, 4 and 6, are void for the further reason that they are repugnant to, and in conflict with, section 8 of article 1 of the constitution of the United States, in that the said laws, rules and regulations, as interpreted and construed by the Board of Health, and its executive officer, the defendant, S. J. Crumbine, constitute an unreasonable interference with interstate commerce, in which the plaintiff is engaged.

"16. Plaintiff further alleges that no judgment of any court has ever been rendered, determining that said Mary Jane syrup is misbranded.

"17. Plaintiff further alleges that the label hereinbefore set out meets with every requirement of, and complies with every provision of, the federal food and drugs act, and of the Kansas food and drugs law, except said regulation No. 6.

"18. Plaintiff further alleges that the said Board of Health, and its executive officer, the defendant, S. J. Crumbine, claim that the said Mary Jane syrup, as labeled by the plaintiff, is misbranded because the label does not contain the word 'compound' and because the label does not state the percentage of each ingredient of which said Mary Jane syrup is composed.

"19. Plaintiff further alleges that the said Board of Health, and its executive officer, the defendant, S. J. Crumbine, pretending and assuming to act under and by virtue of the authority of said regulations 3, 4 and 6, have arbitrarily and unlawfully notified the plaintiff's agents and representatives, and the wholesale and retail merchants dealing in said Mary Jane syrup in the state of Kansas, that said syrup as furnished to said wholesale merchants by the plaintiff is misbranded in the particulars above specified, and that it is unlawful to sell, or offer the same for sale, in the state of Kansas under said brand."

It was further alleged that the plaintiff's business in Kansas had been practically ruined by this conduct of the defendants, and that the plaintiff had no adequate remedy at law.

The relief prayed for was that the defendants be enjoined from enforcing the provisions of regulation 6, and from notifying plaintiff's customers and other persons that the syrup under the label set out above was misbranded, and from attempting to compel the plaintiff to place the word "compound" on the "Mary Jane" labels.

To this petition the defendants filed a general demurrer, upon the ground that the petition did not state facts sufficient to constitute a cause of action. The demurrer was overruled, and the trial court at the same time filed its decision on ques-

tions of law which is set out in full at pages 14-17 of the record. In this decision, most of the questions of law involved in the case are discussed by the trial court with great clearness and ability, the conclusions being stated as follows:

Conclusions.

I. Rule 6 of the State Board of Health is not invalid because the power under which the same was made was a delegation of legislative authority to the Board.

II. The Board of Health, within the limits prescribed by the food and drugs law and for the purpose of preventing adulteration and misbranding, may require manufacturers of proprietary foods to state on the labels the names and percentages of the ingredients used, but it may not do so when such requirement conflicts with the terms of the law itself.

III. The syrup manufactured by the plaintiff is a compound known under its own distinctive name and the label is not on its face deceptive or misleading. Such label is sufficient under the terms of the Kansas food and drugs act.

IV. The Kansas food and drugs law and the federal law on the same subject being practically identical, it can not be said that the former covers ground not included in the latter within the rule stated in Savage v. Jones, 225 U. S. 501.

V. Inasmuch as plaintiff's syrup is an article in interstate commerce, and the designation of the same on the label as "corn syrup" being sufficient under the decision of the federal officials, the State Board of Health cannot require such designation changed to "glucose." (McDermott v. Wisconsin, 228 U. S. 115.)

Thereafter answer was filed by the defendants which contained various admissions and denials of the several allegations contained in the plaintiff's petition, and pleaded as a defense the following matters:

Defendants admit that it is claimed by the defendant S. J. Crumbine that the said "Mary Jane" syrup,, as labeled by the plaintiff, is misbranded because the label does not contain the word "compound," and because the label does not state the percentage of each ingredient of which said "Mary Jane" syrup is composed, but deny that the above are the only grounds on which it is claimed that "Mary Jane" syrup, as labeled by the plaintiff, is misbranded. . . .

And further answering these defendants allege and say that the plaintiff is now and was at the time, and all the time set out in their amended petition, a corporation organized and existing under and by virtue of the laws of the state of New

Jersey, having its chief office in New York City, and that the plaintiff is now and has been for many years last past engaged in the manufacture of a syrup and that said syrup has been commonly called and is called "Mary Jane" syrup and is sometimes sold under the name of "Mary Jane" Sorghum.

That the Board of Health, for the purpose of preventing misbranding and adulteration, promulgated the rules set out in paragraph 8 of plaintiff's amended petition and required manufacturers of proprietary foods to state on the labels the names and percentages of the ingredients used.

And further allege that the syrup manufactured by the plaintiff herein, and the subject of the litigation, comes within the provisions of said order of the board, and that said label under which said syrup is sold is insufficient and misleading in fact in that said label is of such a nature as to lead purchasers of said syrup to believe that said syrup is composed of about equai parts of corn syrup, molasses and pure country sorghum.

And further allege that it is deceptive in this, to wit, that it does not contain or set out the amount of sulphur dioxide contained in said syrup.

That said brand and label is used for the purposes of misleading wholesale and retail dealers and misleading the public into the belief that said syrup is a syrup composed of equal parts of corn syrup, molasses and pure country sorghum, as hereinbefore set out, and that such label is deceitful and misleading in fact.

That while said label contains the statement hereinabove set out, that said syrup contains corn syrup, molasses and pure country sorghum, it is sold and billed to wholesalers as "Mary Jane" sorghum.

Defendants further allege that the sorghum is much more expensive compound than corn syrup or molasses syrup, and that while such label would convey, and does convey, the idea, as hereinbefore set out, that said syrup is composed of equal parts of corn syrup, molasses and pure country sorghum, there is only enough sorghum and molasses contained in said "Mary Jane" syrup to give a color and to make it look and appear as a sorghum syrup, but that for other purposes than to make said syrup appear in color as a sorghum syrup the amount of sorghum is negligible and of such small per cent as to add little, if anything, to the value of said syrup; and that by reason of the facts hereinabove set out said label on the said "Mary Jane" syrup is deceitful and misleading in fact, and the plaintiff, in using the same, is practicing deception and fraud within the meaning of the pure food and drug act of the state of Kansas as to the ingredients contained in its syrup.

For reply to this answer, the plaintiff filed a general denial.

THE JUDGMENT OF THE TRIAL COURT.

Upon the trial the court found generally for the plaintiff, that all allegations in its petition were true, and enjoined the defendants—

"From in any way interfering with the sale of Mary Jane in the state of Kansas upon the ground and for the reason that the same is misbranded when sold under the label referred to in plaintiff's petition, and that they be forever enjoined from notifying the plaintiff's customers or other persons within the state of Kansas or elsewhere that the said Mary Jane is misbranded when the label referred to in plaintiff's petition is attached to the cans, and that they be further enjoined from attempting to compel the plaintiff to label the said Mary Jane 'A Compound', and from threatening to or taking any steps whatever to intimidate the plaintiff's customers or other persons dealing in or selling the said Mary Jane syrup so branded within the state of Kansas because of regulation 6, and that the plaintiff recover its costs herein, taxed at $———." (Rec. 2-3.)

JUDGMENT AND OPINION OF THE KANSAS SUPREME COURT.

From this judgment of the district court the defendants appealed to the Supreme Court of Kansas. The Federal questions raised in the plaintiff's petition, as hereinbefore set out, were fully briefed and argued orally upon the hearing of the case in the State Supreme Court. The judgment entered by the Supreme Court of Kansas was that the judgment of the district court be reversed and the cause remanded with directions to enter judgment for the defendants. The following opinion was filed (99 Kan. 63):

No. 20280.

CORN PRODUCTS REFINING CO., Appellee,

v.

V. C. EDDY et al., Appellants.

Appeal from Shawnee County, Second Division. Reversed.

Syllabus by the Court.

MARSHALL, *J.*:

An injunction will not lie to restrain the State Board of Health from seeking to prevent, by legal means, the sale of a compound table syrup under the name "Mary Jane," where the

label does not show the place of manufacture or production, and where it is not plainly stated on the package in which the syrup is offered for sale that it is a compound.

The opinion of the court was delivered by

MARSHALL, *J.*:

The defendants appeal from a judgment enjoining them from interfering with the sale of "Mary Jane", a product manufactured by the plaintiff, and from attempting to compel the plaintiff to label "Mary Jane" a compound.

The plaintiff is engaged at Granite City and Argo, Illinois, in the manufacture of a table syrup composed of eighty-five per cent corn syrup or glucose, ten per cent molasses and five per cent sorghum. This syrup is sold under the name "Mary Jane" in cans labeled as follows:

"5 Pounds Net Weight.

Mary Jane.

Reg. U. S. Pat. Off.

Mary Jane is guaranteed by Corn Products Refining Co. to comply with the Food and Drug Act, June, 30, 1906. Registered under serial number 2317.

Mary Jane. A Table Syrup Prepared from Corn Syrup, Molasses and Pure Country Sorghum. Contains Sulphur Dioxide.

M'f'd by Corn Products Refining Co.

General Offices—New York, U. S. A."

The defendants constitute the Kansas State Board of Health. They contend that Mary Jane is misbranded in several particulars. Two of these dispose of this case. The defendants claim that "Mary Jane" is a compound and that it is misbranded because the place of its manufacture or production is not shown, and because it is not specifically stated that "Mary Jane" is a compound. The defendants, through inspectors acting under the direction of defendant S. J. Crumbine, the Secretary of the Board, have notified the plaintiff's agents and representatives that "Mary Jane" is misbranded; that it is unlawful to sell it in Kansas as it is branded, and that those who sell it will be prosecuted.

Does the law require that this label shall contain a statement showing the place where "Mary Jane" is manufactured or produced? Part of section 3082 of the General Statutes of 1909 reads:

"Provided, That an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases: First, in the case of mixtures or compounds which may be now

or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with the statement of the place where said article has been manufactured or produced."

The defendants contend that "Mary Jane" is not a distinctive name for the article sold. It is not necessary to pass on that question at this time. We will assume, for the purpose of discussing the question now under consideration, that "Mary Jane" is a distinctive name and that the article sold thereunder is a mixture or compound, and is not an imitation of, or offered for sale under the distinctive name of, any other article. The label then, so far as these provisions are concerned, complies with the law; but the label contains no statement of the place where "Mary Jane" is manufactured or produced. The statute requires that this be shown, and the label does not conform to the statute unless it is shown.

Is it necessary that the words "compound" appear in the label? The statute covering this question reads:

"Second. In the case of articles labeled, branded or tagged so as to plainly indicate that they are compounds, imitations or blends, and the word 'compound,' 'imitation,' or 'blend,' as the case may be, is plainly stated on the package in which it is offered for sale."

(Gen. Stat. 1909, sec. 3082.)

The statement on the label showing the ingredients from which "Mary Jane" is manufactured apparently indicates that it is a compound table syrup. However, it is not plainly stated that it is a compound. So far as this label shows, the process of manufacture may be such that the article produced is an entirely new product manufactured from, and not one composed of, corn syrup, molasses and sorghum. The label says that "Mary Jane" is "Prepared from corn syrup, molasses and pure country sorghum", but "prepared from" does not necessarily mean "composed of" these ingredients. If "Mary Jane" is a compound, and the evidence shows that it is, the labels on the cans in which it is offered for sale should plainly state that fact.

So long as neither of these provisions of the statute has been complied with, an injunction should not issue against the Board of Health to restrain it from using all legal means for the enforcement of the law.

It is not necessary to discuss the other questions presented by the defendants. The judgment of the district court is reversed and that court is directed to enter judgment for the defendants.

All the justices concurring except Dawson, J., who did not sit.

This writ of error is prosecuted to reverse the judgment rendered by the Supreme Court of Kansas.

ASSIGNMENTS OF ERROR.

Ten assignments of error are set out in the petition for the writ of error, but we believe the two set out below sufficiently raise the questions to be argued.

In its said judgment the Supreme Court of the State of Kansas erred:

VII.

In deciding in favor of the validity of the authority of the defendants claimed and exercised by them under chapter 266 of the Kansas session laws of 1907, as amended by chapter 184 of the laws of 1909, to prevent the importation and sale in the state of Kansas of the said proprietary article of food manufactured by the plaintiff and known by the distinctive name of "Mary Jane," which is not the name of any other article of food, and which said product contains nothing deleterious or injurious to health, where the label does not show the place of manufacture or production and where it is not plainly stated on the package in which the article is offered for sale that it is a compound, by notifying the manufacturers, agents and representatives of the plaintiff in error, and the wholesale and retail merchants dealing in said "Mary Jane" in the State of Kansas, that said syrup as furnished to said wholesale merchants by the plaintiff in error is misbranded, and that it is unlawful to sell or offer the same for sale in the State of Kansas under said brand, said plaintiff in error having in said suit drawn in question the validity of said statute and authority on the ground of their being repugnant to the fourteenth amendment to the constitution of the United States, and on the further ground that it is repugnant to and in conflict with section 8 of article 1 of the constitution of the United States, and on the further ground that it is repugnant to and in conflict with the act of Congress of June 30, 1906, commonly known as the Federal Food and Drugs Act.

IV.

In setting aside that part of the judgment of the District Court of Shawnee county, Kansas, enjoining the defendants in error from interfering with the importation and sale of said "Mary Jane" under said brand in interstate commerce in the State of Kansas, upon the ground and for the reason that said

brand does not state the percentage of each ingredient of which said "Mary Jane" is composed thereby deciding in favor of the authority of the defendants to prevent the importation and sale in interstate commerce in the State of Kansas of said "Mary Jane" under said brand because the percentage of the ingredients is not stated thereon, the plaintiff in error having in said suit drawn in question the validity of said authority on the ground of its being repugnant to the fourteenth amendment to the constitution of the United States and to section 8 of article 1 of the constitution of the United States and to the act of Congress of June 30, 1906, commonly known as the Federal Food and Drugs Act.

ARGUMENT.

The Federal questions involved in the case and to be argued in the brief may be shortly stated as follows:

I.

Is the Kansas statute, as construed by the State court, in conflict with the act of Congress known as the Food and Drugs Act of June 30, 1906 (34 Stat. 768, C. 3915)?

II.

Does regulation 6 of the Kansas State Board of Health, requiring the printing on labels of syrup containers of the percentage of each ingredient violate the equal-protection and due-process clauses of the Fourteenth Amendment to the Constitution of the United States?

I.

The first question presented is whether the statute of Kansas is in conflict with the act of Congress known as the Food and Drugs Act of June 30, 1906 (34 Stat. 768, C. 3915).

The allegations of the petition in regard to the manner in which the plaintiff conducted its business showed plainly that it constituted interstate commerce. The trial court found all of the allegations in the petition to be true. The Supreme Court did not question these findings. The allegations in substance were that the plaintiff's representatives and agents solicit sales of "Mary Jane" in Kansas from wholesale merchants and forward the orders to the factories at Granite City and Argo, Illinois, where the orders are subject to the

approval of the plaintiff and that the plaintiff has never carried a stock of "Mary Jane" in Kansas. The petition further alleged that the plaintiff's customers who import this syrup in original packages from Illinois to Kansas and there sell it in such packages had been warned by the defendants to cease further sales in order to avoid liability for the penalties prescribed by the Kansas law.

To more clearly demonstrate that the defendants were interfering with the interstate sale of this syrup we call attention specially to the letter of warning sent out by the Assistant Chief Food and Drug Inspector, directed to "Ryley-Wilson Grocery Company, Kansas City, Missouri" (Rec. 22), which shows that the defendants were even sending their warnings to wholesalers in Missouri and attempting to stop the importation of the syrup into Kansas before it crossed the state line. The manner in which plaintiff's business is conducted is very similar to that outlined in the case of *Savage v. Jones*, 225 U. S. 501, where the court says, on page 520:

"It clearly appears from the bill that the complainant was engaged in dealing with purchasers in another State. His product manufactured in Minnesota, was, in pursuance of his contracts of sale, to be delivered to carriers for transportation to the purchasers in Indiana. This was interstate commerce, in the freedom of which from any unconstitutional burden, the complainant had a direct interest. The protection accorded to this commerce by the Federal Constitution extended to the sale by the receiver of the goods in the original packages. *Leisy v. Hardin*, 135 U. S. 100; *In re Rahrer*, 140 U. S. 545, 559, 560; *Plumley v. Mass.*, 155 U. S. 461, 473; *Vance v. Vandercook Co.* (No. 1), 170 U. S. 438, 444, 445; *Schollenberger v. Penn.*, 171 U. S. 1, 22, 25; *Heyman v. So. Ry.*, 203 U. S. 270, 276."

It was held in the case of *Savage v. Jones*, supra, that the Indiana statute under consideration in that case covered a ground or field of regulation which had not been included in the Federal statute, and that therefore the State regulation should be upheld as applying to interstate commerce. We have a different situation in this case, however. The trial court in the present case made the following finding or conclusion in ruling on the demurrer to the plaintiff's petition:

"IV. The Kansas food and drug law and the federal law on the same subject being practically identical, it cannot be said

that the former covers ground not included in the latter, within the rule stated in *Savage v. Jones*, 225 U. S. 501." (Rec. 17.)

The written opinion of the trial court is fully set out in the record (pp. 14-17). From that opinion we quote the following, which is merely an elaboration of the trial court's conclusion as stated in its fourth finding set out above:

"As already indicated, the statute under consideration in *Savage v. Jones*, supra, was held by the Supreme Court of the United States to cover a field not taken possession of by Congress, but this cannot be said of the Kansas food and drug law. It is almost word for word a reproduction of the Federal law. If Congress has limited the scope of its prohibitions in its food and drug law, so also has the State of Kansas, because both cover exactly the same territory; nor can it be said that the State Board of Health, acting under, and limited by the terms of the State statute, by its own rules may broaden the field of State regulation. (See *Savage v. Jones*, 225 U. S. 501-532.)"

An examination of the Kansas food and drug act, which is found in sections 4059, 4089, General Statutes of Kansas, 1915 (this being the latest compilation of the Kansas laws), and a comparison of this act with the Federal food and drug statute shows that the Kansas statute was literally copied from the Federal act. Section 8 of the Kansas statute (4066 of the 1915 General Statutes), which defines the term "misbranded," is a literal and exact copy of section 8 of the Federal act, except that in the following proviso at the close of the section the italicized words have been added by the State Legislature and do not appear in the Federal act:

"And provided further that nothing in this act shall be construed as requiring or compelling proprietors or manufacturers of proprietary foods, which contain no unwholesome ingredients, to disclose their trade formulas, except insofar as the provisions of this act, *or the regulations of the State Board of Health* may require to secure freedom from adulteration or misbranding."

Completely ignoring the interstate commerce feature and the identity of the provisions of the State law and the Federal law, which had been so clearly grasped and applied by the trial

court, the Supreme Court of Kansas proceeded to construe the State statute and apply it to the plaintiff's business.

The Federal law and the State law having covered the same field and being alike in their prohibitions, the State law is wholly superseded by the Federal law in the field of interstate commerce. The supremacy of the Federal law over State law within the legitimate sphere of Federal legislation can no longer be doubted.

McDermott v. Wisconsin, 228 U. S. 115.
Reid v. Colorado, 187 U. S. 137, 146, 147.
Adams Exp. Co. v. Croninger, 226 U. S. 491.
Asbell v. Kansas, 209 U. S. 251, 256, 257.
St. L. & I. M. Ry. v. Edwards, 227 U. S. 265.
Northern Pacific Ry. Co. v. Washington, 222 U. S. 370, 378.
Seaboard Air Line v. Horton, 233 U. S. 492.
Southern Ry. Co. v. Reid, 222 U. S. 424, 436.

As stated by Mr. Justice Hughes, in the Minnesota Rate Cases:

"There is no room in our scheme of government for the assertion of state power in hostility to the authorized exercise of federal power."

Simpson v. Shepard, 230 U. S. 352, 399.

It is to be remembered that the specific complaint made by the State Board of Health against the plaintiff's syrup was that it was misbranded. The relief asked by the plaintiff in its bill or petition was that the enforcement against the plaintiff's syrup of the defendants' requirements as to methods of branding be enjoined. Hence the case here presented is one of alleged misbranding. The Federal definition of misbranding is identical with the State definition of that term. This being true, the State law has added nothing to the Federal law. The statute which governs the branding of the plaintiff's products while they remain in the channels of interstate commerce is the Federal statute and not the State statute. The administrative body to whom is given the duty of applying and enforcing these statutory regulations as to the plaintiff's products which come through the channels of interstate commerce

is the Federal board and not the defendants who constitute the State board.

At the time this action was commenced only two charges of "misbranding had been made by the defendants against the plaintiff's syrup: (*a*) That the label did not show the percentages of the ingredients of which the syrup is composed. (*b*) That the label did not contain the word "compound." (Exhibit B, Rec. 2, 22.) The opinion filed by the State Supreme Court injected a new charge of misbranding into the case, which had not been raised by the defendants in the trial court. In addition to holding the syrup misbranded because the label did not contain the word "compound," one of the original requirements made by the defendants, the Supreme Court held that it was also misbranded because the label did not bear a statement of the place of manufacture or production.

It may be said, therefore, that since the decision of the Kansas Supreme Court was rendered, there are three things which the State requires to be added to the Mary Jane label before importation and sale of the syrup in Kansas will be permitted: (*a*) That the label must state the percentage of the different ingredients; (*b*) that the label must bear the word "compound"; (*c*) that the label must show the place of manufacture or production.

For the convenience of the Court we here again set out the label which the cans in which this syrup is put up and sold, and whose use is forbidden in Kansas, bear:

"5 Pounds Net Weight.

Mary Jane.

Reg. U. S. Pat. Off.

Mary Jane is guaranteed by Corn Products Refining Co. to comply with the Food and Drug Act, June 30, 1906. Registered under serial number 2317.

Mary Jane. A Table Syrup Prepared from Corn Syrup, Molasses and Pure Country Sorghum. Contains Sulphur Dioxide.

M'f'd by Corn Products Refining Co.

General Offices—New York, U. S. A."

If there be any necessity of changing this label to meet the requirements set out above, it must be found in the terms of

the statute. Section eight of the statute (both Federal and State, for the two are identical) provides that an article of food is misbranded:

"First. If it be an imitation of, or offered for sale under the distinctive name of another article.

"Second. If it be labeled or branded so as to deceive or mislead the purchaser by purporting to be a foreign product when it is not, or if the contents of the package as originally put up shall have been removed in whole or in part and other contents placed in such package, or if it fail to bear a statement on the label of the quantity or proportion of any morphine, etc., or any derivative or preparation of any such substance contained therein, or which shall omit to state the presence of any artificial coloring matter contained therein.

"Third. If in package form, and the contents are stated in terms of weight, measure or quantity, the net weight, measure or quantity is not plainly and correctly stated on the outside of the package.

"Fourth. If the package containing it, or its label, shall bear any statement, design or device regarding the ingredients, or the substances contained therein, which statement, design or device shall be false or misleading in any particular."

The State Supreme Court does not find that the label on plaintiff's syrup falls within any of these four specified classes of misbranding. And these four classes cover the whole field of the statutory definition of misbranding. After having thus fully defined "misbranding," the statutes (both State and Federal, for their wording is still identical) proceed, in a proviso added to section 8, to define what shall not constitute misbranding. And the Kansas Supreme Court, after erroneously holding that the plaintiff's label did not contain the proper showing to bring it within this proviso, in a most surprising slip from the beaten paths of logic, comes to the conclusion that it is therefore misbranded. Under a proper construction of the law, even if plaintiff's syrup was not so labeled as to fall within the proviso, it would still have to violate one of the four positive specifications in the main body of the definition before becoming subject to a charge of misbranding.

There is no statutory direction that manufacturers of proprietary foods shall state the place of manufacture upon the label. Neither is there any declaration that they shall state the word "compound" thereon. The reference made to these terms is found in the proviso near the end of Section 8, which

is a declaration of when an article shall not be deemed to be misbranded. That proviso reads:

"Provided that an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases: First, in the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with the statement of the place where said article has been manufactured or produced; second, in the case of articles labeled, branded or tagged so as to plainly indicate that they are compounds, imitations or blends, and the word 'compound,' 'imitation' or 'blend' as the case may be, is plainly stated on the package in which it is offered for sale; provided, that the term 'blend' as used herein shall be construed to mean a mixture of like substances, not excluding harmless coloring or flavoring ingredients used for the purpose of coloring and flavoring only."

The usual and primary office of a proviso is to limit generalities by excluding from the scope of a statute or definition that which otherwise would be within its terms. Such clearly is the office of this proviso.

It is not an affirmative requirement that those matters shall be shown on the labels in order to constitute proper branding, but it is a declaration that when certain articles of food bear on their labels the word "compound," or statements of the place of manufacture or production then they shall fall outside of the general provisions of the law.

It was alleged in the plaintiff's petition that "Mary Jane" is a proprietary food and has always been sold under the distinctive name of "Mary Jane", which is not the name of any other article of food, and that it contains nothing deleterious or injurious to health. The trial court found that all of the allegations contained in the plaintiff's petition were true. Its judgment in favor of the plaintiff also operated as a finding that there was nothing deceptive, fraudulent or misleading about the label as charged in the defendants' answer. The Supreme Court did not question or disturb any of these findings. Indeed, the opinion of the Supreme Court is entirely based upon the assumption that "Mary Jane" is an article of food which does not contain any added poisonous or deleterious ingredients, for the opinion discusses those portions of the Kansas law only

which have to do with such articles of food. The court, in the opinion, says:

"We will assume, for the purpose of discussing the question now under consideration, that 'Mary Jane' is a distinctive name and that the article sold thereunder is a mixture or compound and is not an imitation of, or offered for sale under the distinctive name of any other article." (Record, p. 41.)

By the entire record it is thus established that "Mary Jane" is a wholesome article of food sold under its own distinctive name containing no deleterious ingredients, and not an imitation of, or offered for sale under the distinctive name of any other article, and that its label is not deceptive, misleading or fraudulent.

In construing the proviso above quoted relating to such articles of food as that which is here involved, this Court said:

"As is well known, products may be sold, and in case of so-called proprietary articles frequently are sold, under trade names which do not reveal the ingredients of the composition and the proprietors refrain from revealing them. Moreover, in defining what shall be adulteration or misbranding for the purposes of the Federal act, it is provided that mixtures or compounds known as articles of food under their own distinctive names, not taking or imitating the distinctive name of another article which do not contain 'any added poisonous or deleterious ingredients' shall not be deemed to be adulterated or misbranded if the name be accompanied on the same label or brand with a statement of the place of manufacture. (Sec. 8.) Congress has thus limited the scope of its prohibitions."

Savage v. Jones, 225 U. S. 501, 532.

If Congress has limited the scope of its prohibitions in its food and drugs law, so, also, has the State of Kansas, because both cover exactly the same territory.

These provisions being identical in the Federal law and in the State law, in applying them to food transported in interstate commerce they must be treated as requirements of the Federal statute and not of the State statute. It is not a case of Congress having left the field open for State regulation on this point. The two laws being the same, the State laws must be disregarded insofar as interstate commerce is concerned, and the construction of this language is for the Federal authorities and the Federal courts. As said by this Court in the case of *McDermott v. Wisconsin*, 228 U. S. 115-132:

"It is enough for the present purpose to say that, so far as this record discloses, it was undertaken in good faith to label the articles in compliance with the act of Congress, and, if they were not so labeled, by section two provision is made for the enforcement of the act by criminal prosecution, and by section ten by proceedings *in rem*. Whether the labels complied with the Federal law is not for the State to determine. This was a matter provided for by the act of Congress, to be determined as therein indicated by proper proceedings in the Federal courts."

Assuming, therefore, that the construction placed by the Kansas Supreme Court upon the statutory definition of "misbranding" is in no way binding upon this Court, we submit that the court wholly misconstrued the language of the statute relating to foods sold under distinctive names when it held that the labels on such foods must bear the word "compound" and a statement of the place of manufacture, in order to escape liability under a charge of misbranding.

The Kansas court also erred in holding that under its present label "Mary Jane" does not come within the distinctive name class of foods granted immunity by the proviso of section 8.

The Court will observe that there are two classes of compounds named and described by the proviso in section 8 of the statute. The first of these is a compound sold under a distinctive name. In this class falls "Mary Jane." The second is a compound, imitation or blend without a distinctive name. The printing of the word "compound", "imitation", or "blend" is only required in that class of articles which are without a distinctive name. "Mary Jane" having a distinctive name of its own which is not the name of any other article, does not fall within that class, and hence the plaintiff did not print the word "compound" on the label.

In the case of *United States v. Coca Cola Co.*, 241 U. S. 265, this Court says, on page 287:

"A 'distinctive name' may also, of course, be purely abitrary or fanciful and thus, being the trade description of the particular thing, may satisfy the statute, provided the name has not already been appropriated for something else so that its use would tend to deceive."

Being an article known by its own distinctive name, and not being an imitation of or sold under the name of another article,

"Mary Jane" fully complies with the statute "if the name be accompanied on the same label or brand with the statement of the place where said article has been manufactured or produced." The apparent purpose and intent of this provision is that the location of the person responsible for the article, the proprietor of it, be disclosed on the label. The trial court held to the view that this is its purpose rather than that the particular factory of that proprietor where the individual packages were manufactured be named on the label, and we believe the soundness of this view cannot be open to reasonable doubt. Hence the plaintiff, as manufacturer of "Mary Jane," has not attempted to put on the label of each package the location of the particular factory where that package was produced, but has, in good faith, given the location of its principal office and place of business. This is clearly sufficient. The Federal authorities have never questioned its sufficiency.

The State authorities cannot condemn as misbranded foods in interstate commerce which the Federal law expressly declares to be properly branded. In other words, the congressional declaration in the proviso at the end of section 8 that proprietary foods, such as "Mary Jane", when labeled as it is labeled, and when sold in interstate commerce, "shall not be deemed to be misbranded", gives to these products as articles of interstate commerce a bill of clearance which protects them on the shelves even of the retail dealer, and which is unimpeachable either by Federal regulations or by the statutes or administrative regulations of the States. This is demonstrated by the following quotations.

In *McDermott v. Wisconsin*, 228 U. S. 115, this Court says, on page 130:

"Within the limitations of its right to regulate interstate commerce, *congress manifestly is aiming at the contents of the package as it shall reach the consumer, for whose protection the act was primarily passed*, and it is the branding upon the package which contains the article intended for consumption itself which is the subject matter of regulation."

In *Savage v. Jones*, 225 U. S. 501, the Court says, on page 532:

"Moreover in defining what shall be adulteration or misbranding for the purpose of the federal act, it is provided that

mixtures or compounds known as articles of food under their own distinctive names, not taking or imitating the distinctive name of another article, which do not contain any added poisonous or deleterious ingredients, shall not be deemed to be adulterated or misbranded, if the name be accompanied on the same label or brand with a statement of the place of manufacture. (Sec. 8.)"

And again, on page 533, in the same opinion, the Court says:

"If the purpose of the act cannot otherwise be accomplished, —if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the state law must yield to the regulation of congress within the sphere of its delegated power."

The power of Congress on this subject, not only to protect the public against misbranded goods coming into the state in interstate commerce, even until the goods reached the hands of the ultimate consumer, but also to protect the honest proprietor or shipper of foods expressly declared by Congress to be properly branded, even on the shelves of the retail dealer, is shown by the following quotation from *McDermott v. Wisconsin*, supra (page 133):

"Conceding to the state authority to make regulations consistent with the federal law for the further protection of its citizens against impure and misbranded food and drugs, we think to permit such regulation as is embodied in this statute is to permit a state to discredit and burden legitimate federal regulations of interstate commerce, *to destroy rights arising out of the federal statute which have accrued* both to the government and *the shipper*, and to impair the effect of a federal law which has been enacted under the constitutional power of congress over the subject."

This Court held, in the case of *United States v. Coca Cola Co.*, 241 U. S. 265, 278:

"Proprietary foods sold under distinctive names, are within the purview of the provision. Not only is 'food' defined as including articles used for food or drink 'whether simple, mixed or compound', but the intention to include 'proprietary foods' sold under distinctive names is manifest from the provisos in section 8 which the claimant invokes. 'Mixtures or compounds' which satisfy the first paragraph of the proviso are not only 'articles of food', but are *to enjoy the stated immunity* only in case they do 'not contain any added poisonous or deleterious ingredients.' By the concluding clause of section 8, it is

provided that nothing in the act shall be construed to require manufacturers of 'proprietary foods' to disclose 'their trade formulas' except in so far as the provisions of the act 'may require to secure freedom from adulteration or misbranding,' and *the immunity is conditioned* upon the fact that such foods 'contain no unwholesome added ingredient.' "

It has never been claimed by the defendants that "Mary Jane" contains any added poisonous or deleterious ingredients. "Mary Jane", therefore, is not only in a state of negative security in that it does not violate the Federal provisons against misbranding, but it is in a state of positive security or immunity in that it falls within a class which is affirmatively declared by the Federal statute not to be misbranded.

The requirement of the defendants that the label on this syrup must contain a statement of the formula or percentages of all ingredients is also untenable as to the plaintiff's interstate business, because of its conflict with the Federal statute. The immunity awarded to the syrup by the proviso covering articles of food sold under distinctive names renders the label sufficient as it stands, and protects it against a requirement for disclosure of formulae. So also does the last proviso at the very end of section 8, which specifically provides that the manufacturers of proprietary foods shall not be required to disclose their formulae except when necessary "to secure freedom from adulteration or misbranding." To determine what is misbranding those to whom is given the duty of enforcing the law must turn to the statutory definition. Turning to this definition we find, as already shown, four specified grounds of misbranding, none of which is violated by the plaintiff's labels.

The claim was made by counsel for defendants that regulation 6 was an additional requirement on the part of the State, going beyond the field occupied by the Federal statute, and hence that it should be upheld as a valid regulation of interstate commerce, under the principle applied in *Savage v. Jones*, supra. The difficulty with this argument, however, is that if it goes beyond the field occupied by the Federal statute it also goes beyond the field occupied by the State statute, the definition of misbranding being identical in both laws.

Section 3 of the Kansas act is the source of the authority of the State Board to make regulations. It provides that "the State Board of Health is authorized and directed to make and

publish uniform rules and regulations *not in conflict with the laws of this state for carrying out the provisions of this act.*" (Sec. 4061, Gen. Stat. Kan. 1915.)

The administrative board, in making regulations cannot go beyond the terms of the statute. It was said by this Court, in *Waite v. Macy*, 246 U. S. 606, 610:

"The secretary and the board must keep within the statute, *Merritt v. Welsh*, 104 U. S. 694, which goes to their jurisdiction (see *Interstate Commerce Commission v. Northern Pacific Ry. Co.*, 216 U. S. 538, 544) and we see no reason why the restriction should not be enforced by injunction as it was, for instance, in *Bacon v. Rutland R. R. Co.*, 232 U. S. 134; *Philadelphia Co. v. Stimson*, 223 U. S. 605, 620; *Santa Fe Pacific R. R. Co. v. Lane*, 244 U. S. 492. We are satisfied that no other remedy, if there is any other, will secure the plaintiff's rights."

Since the Kansas statute itself is inoperative and void as to interstate commerce, because the same identical field has been covered by the superior Federal Statute, the source of power of the State Board of Health is entirely wiped out in so far as interstate commerce is concerned. It follows that the regulations of the State Board of Health cannot in any manner apply to interstate commerce. It would be absurd to contend that a State statute which has no force in the field of interstate commerce because its terms are identical with the terms of the superior Federal statute can stand as the source of power for a state administrative board to enact rules and regulations which override the laws of Congress. The only authority of the State Board is "to make rules and regulations not in conflict with the laws of this State *for carrying out the provisions of this act.*" But the State law has been superseded by the Federal law and Congress has delegated to certain Federal authorities the duty of carrying out the provisions of the Federal statute.

"Whether the labels comply with the federal law was not for the state to determine. This was a matter provided for by the act of Congress and to be determined as therein indicated by proper proceedings in the federal courts."

McDermott v. Wisconsin, 228 U. S. 115-132.

The Federal administrative board having established its regulations and standards for misbranding, those prescribed by

the State Board for the carrying out of a statute identical with the Federal statute become simply inapplicable to the plaintiff.

This claim of the defendants was thus effectively disposed of by the trial court:

"As already indicated, the statute under consideration in *Savage v. Jones*, supra, was held by the Supreme Court of the United States to cover a field not taken possession of by Congress; but this cannot be said of the Kansas food and drugs law. It is almost word for word a reproduction of the federal law. If Congress has limited the scope of its prohibitions in its food and drugs law so also has the state of Kansas, because both cover exactly the same territory, *nor can it be said that the State Board of Health acting under and limited by the terms of the state statute, by its own rules may broaden the field of state regulation.* (See *Savage v. Jones*, 225 U. S. 501-532.)"

II.

But if it should be held that regulation 6 is not void as in conflict with the Federal Food and Drug Act, we contend that it is, nevertheless, unconstitutional and void upon another ground. The plaintiff has contended from the commencement of this litigation that the enforcement of regulation 6, requiring disclosure of formulae, deprives it of its property without due process of law and denies to it the equal protection of the laws. in violation of the Fourteenth Amendment to the Constitution of the United States.

It is this requirement which is really objectionable and burdensome to the plaintiff and against which it really desires relief. The requirement for disclosure of formulae is not found in the statute itself. In fact, the statute, as already shown, appeared to the plaintiff to warrant the sale of the proprietary food such as this bearing the simple label under which it had long been sold. The plaintiff's business being interstate, it endeavored in good faith to comply with the Federal requirements and believes that it has done so. No question has ever been raised as to the validity of this label by the Federal authorities.

The defendants, however, enacted regulation 6 as an administrative measure and insisted that the plaintiff could not import or sell its syrup in the State of Kansas unless it complied with that regulation. The requirement reads:

"Regulation 6.

"C. (b) Manufacturers of proprietary foods are required to state upon the label the names and percentages of the materials used, so far as is necessary to secure freedom from adulteration and misbranding: (1) In the case of syrups, the principal label shall state definitely, in conspicuous letters, the percentage of each ingredient, in the case of compounds, mixtures, imitations, or blends. When the name of the syrup includes one or more of the ingredients, the preponderating ingredient shall be named first."

To comply with the regulation by printing on the label the percentage of ingredients of which the syrup is composed would be very disastrous to the plaintiff. It would mean giving publicity to a private formula, to the advantage of plaintiff's competitors and to the great detriment of the plaintiff's business. Being affected by this requirement the plaintiff conceived that under the due-process clause of the Federal Constitution it was entitled to a review of the question as to whether the enforcement of the regulation would deprive it of a right protected by the Constitution.

Chicago, &c. v. Minnesota, 134 U. S. 418-458.
Chicago, &c, Ry. v. Tomkins, 176 U. S. 167-174.
Prentice v. Atl. Coast Line, 211 U. S. 210.
Mo. Pac. Ry. v. Nebraska, 217 U. S. 196-207.
O. R. & N. Co. v. Fairchild, 224 U. S. 510.
San Joaquin Co. v. Stanislaus Co., 233 U. S. 454.
Bacon v. Rutland, 232 U. S. 134.

It therefore sought its remedy in this equity suit, to enjoin the enforcement of regulation 6, which the defendants were proceeding to enforce by issuance of warnings and threats against the importation and sale of "Mary Jane", so long as it failed to bear a statement of the formula, as required by the regulation. The trial court found for the plaintiff, and rendered judgment enjoining the defendants, among other things, "from threatening to or taking any steps whatever to intimidate the plaintiff's customers or other persons dealing in or selling said "Mary Jane" syrup, so branded, within the State of Kansas, because of regulation 6."

The Supreme Court of the State, without passing directly

upon the question of whether the defendants have a right under the Constitutional limitations, to require the disclosure of the private formula, has left them at liberty to do so by reversing generally the judgment entered by the trial court.

If the label should bear the word "compound", or a statement showing the location of the factory where the syrup is made, that fact certainly did not warrant the Supreme Court in setting aside that part of the judgment which enjoined the defendants from enforcing regulation 6.

We have already called attention to the provisos in section 8 of both the Federal and State statutes, protecting manufacturers of proprietary foods, and especially those sold under distinctive names, as is the plaintiff's syrup, in the privacy of their formulae. Both the National and State Legislatures have thus declared plainly that to compel disclosure on the labels of these formulae would deprive many thoroughly legitimate industries of their most valuable property right. Such a requirement is unreasonable. To avoid infringing upon constitutional limits police regulations must be reasonable and must have some real relation to the public welfare and needs.

We contend, therefore, that to require the plaintiff to state on the labels the formula of the syrup amounts to a taking of its property without due process of law and denies it the equal protection of the laws, in violation of the Fourteenth Amendment to the Federal Constitution. If regulation 6, promulgated by the State Board of Health, is to be treated as applying to a syrup such as that sold by the plaintiff, it is unconstitutional and void.

In *Savage v. Jones*, 225 U. S. 501, this Court says, on page 524:

"The bill complains of the injury to manufacturers if they are forced to reveal their secret formulas and processes. We need not here express an opinion upon this question in the breadth suggested, as the statute does not compel a disclosure of formulas or manner of combination. It does demand a statement of the ingredients and also the minimum percentages of crude fat and crude protein, and the maximum percentages of crude fiber, a requirement of obvious propriety in connection with substances purveyed as feeding stuffs."

The syllabus prepared by the reporter reads:

"*Quaere* whether a State can require disclosure of formulas or trade secrets for mixture of a harmless article whose value depends upon the mixture."

The difference between the requirements of the statute before the court in *Savage v. Jones* and the Kansas requirement above quoted is apparent. The Kansas regulation requires the disclosure of the formulas; that is, it requires "in the case of syrups the principal label shall state definitely, in conspicuous letters, the percentage of each ingredient, in the case of compounds, mixtures, imitations or blends."

The Indiana statute, however, which was under consideration in the case of *Savage v. Jones*, supra, required simply a statement of the ingredients and also of the maximum percentage of crude fat and crude protein and of the maximum percentage of crude fiber, which this Court said was "a requirement of obvious propriety in connection with substances purveyed as feeding stuffs."

We have already called attention to the fact that the record shows conclusively that "Mary Jane" is a wholesome article of food sold under its own distinctive name, and that it is not an imitation of or offered for sale under the name of any other article, and that its present label is not deceptive, misleading or fraudulent. The recognized purpose of the modern legislation embraced within the term "Pure food laws," is two-fold: First, to protect the public against the sale of adulterated foods; and, second, to prevent fraud. In so far as State regulation is reasonably necessary to accomplish these purposes, it has been upheld by this Court. However, it cannot be contended that it is either reasonable or necessary to require the manufacturer of an admittedly wholesome food product which is not so labeled as to deceive or mislead and which is not sold under the name of any other food product, to disclose the private formula by which it is prepared. Such formula, where no fraud is perpetrated, is as much entitled to the protection of the law as the good-will of a business or the ownership of any kind of property.

Mugler v. Kansas, 123 U. S. 623.
Ex parte Young, 209 U. S. 123-148.
Miss. Ry. Com'rs v. Ill. Cen. Ry., 203 U. S. 335.
Smythe v. Ames, 169 U. S. 466.
Ry. Co. v. Tompkins, 176 U. S. 167.
McNeal v. So. Ry., 202 U. S. 543.
Scully v. Bird, 209 U. S. 481.

Dr. Waggoner, one of the chief officers of the plaintiff, testified (R. 26) as follows:

"The objection to putting the percentage in the label is that the success of a syrup like 'Mary Jane' is not due to the mechanical putting together of three different kinds of syrups; but it takes more skill and experience to accomplish that, and if we would be compelled to set out the formula it would, in my opinion, be injurious. It would permit cheap imitations of our product, and put our products in discredit."

If the percentages of the ingredients are stated on the can competitors might mechanically put together the three different kinds of syrups in the same proportions and state the percentages of the ingredients on their labels. Rival dealers could then submit a can of "Mary Jane" and a can of their syrup to purchasers, with a statement that the two articles were exactly the same, and call attention to the labels which showed that the different ingredients were alike. The injury which a manufacturer with a large established trade would suffer from such methods is clear. The benefit of his advertising would be lost if competitors without going to a similar expense could get their product upon the market by the use of the argument that it was exactly the same as a well-known and well-advertised product, being composed of the same ingredients in the same percentages. As shown by Dr. Waggoner, however, the fact would frequently be that by reason of skill and experience in blending one product would be of greater value than another, notwithstanding similarity of formula.

Aside from the mere fact that to require a disclosure of a private formula deprives the manufacturer of his property without due process of law, we believe it is plain that after the secrecy of the formula has once been disclosed the established business of a manufacturer will be injured and his property rights destroyed by the methods outlined above. To require the manufacturer of a wholesome food product sold under its own distinctive name and not an imitation of or offered for sale under the name of any other food product, to state upon the label the ingredients and the percentage of each ingredient, deprives such manufacturer of his property without due process of law and denies to him the equal protection of the laws. Such a regulation is both unnecessary to the welfare of the public and unreasonable in its effect upon the person regulated.

The Kansas regulation No. 6, requiring the disclosure of percentages of ingredients is, therefore, unconstitutional and void, and the plaintiff is entitled to an injunction restraining the defendants from its enforcement. For this reason, as well as because the State requirements burden interstate commerce, the judgment of the Supreme Court of Kansas reversing the judgment of the district court and ordering a dissolution of the injunction against the defendants should be reversed.

Respectfully submitted.

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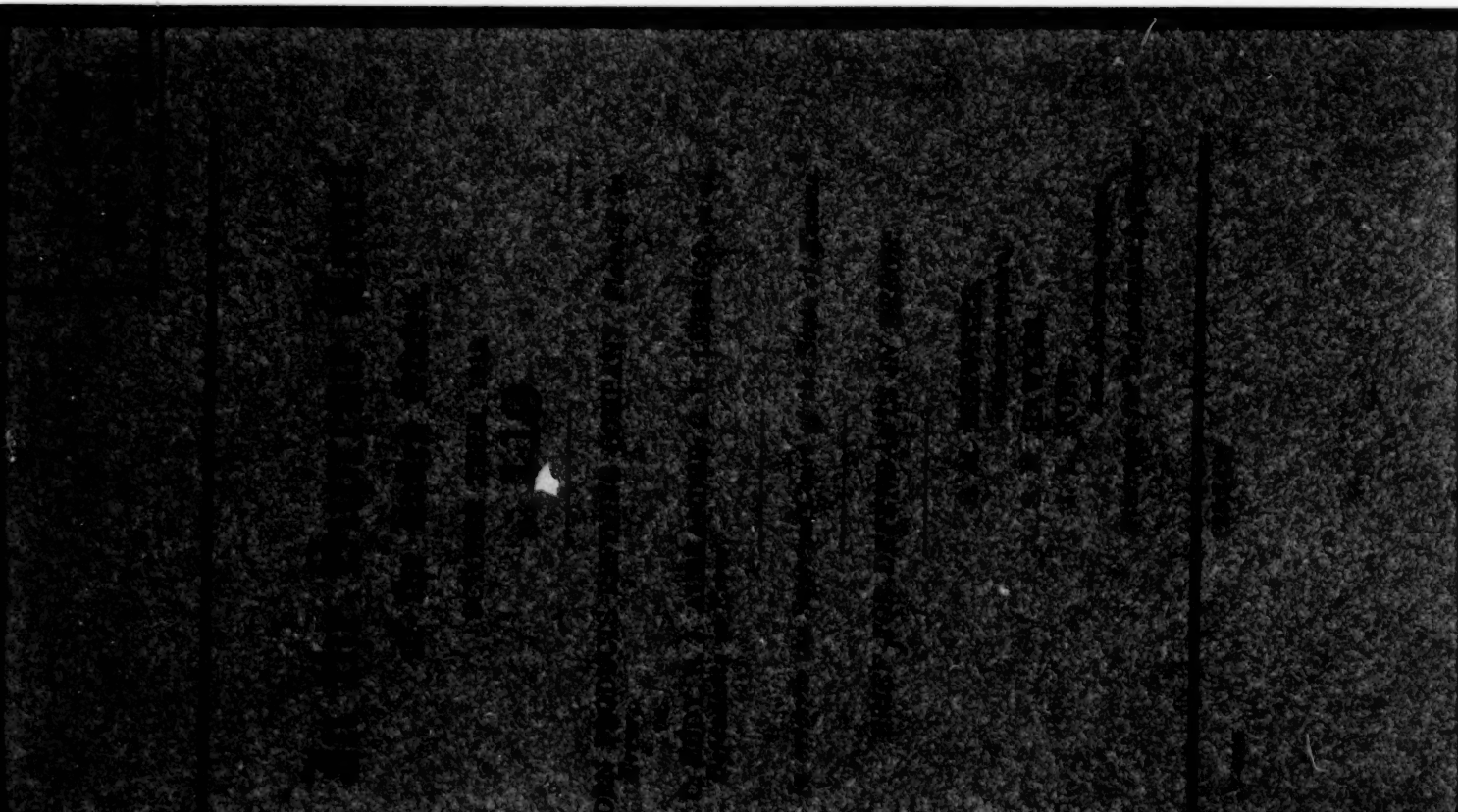
Attorneys for Plaintiff in Error.



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In the Supreme Court of the United States.

OCTOBER TERM, 1918.

No. ———

CORN PRODUCTS REFINING COMPANY, *Plaintiff in Error,*

vs.

V. C. EDDY *et al.*, *Defendants in Error.*

BRIEF FOR DEFENDANTS IN ERROR.

STATEMENT.

This action was commenced on May 2, 1913, in the district court of Shawnee county, Kansas, by plaintiff in error against defendants in error, who constitute the Kansas State Board of Health, to enjoin the enforcement, in so far as it applied to one of plaintiff's products, known as Mary Jane Syrup, of the following portion of a regulation adopted by defendants in error acting as the Kansas State Board of Health, to wit:

"*Regulation 6.*

"Manufacturers of proprietary foods are required to state upon the label the names and percentages of the materials used, so far as is necessary to secure freedom from adulteration and misbranding: (1) In the case of syrups, the principal label shall state definitely, in conspicuous letters, the percentage of each ingredient, in the case of compounds, mixtures, imitations, or blends. When the name of the syrup includes the name of one or more of the ingredients, the preponderating ingredient shall be named first. . . ."

The Pleadings and Record.

In plaintiff's amended petition (trans. 6) upon which the case was tried it is alleged, in so far as the allegations relate to the federal questions open to the consideration of this court, that plaintiff manufactures, at Granite City, Ill., a proprietary syrup which is known and sold under the firm [*sic*] name of "Mary Jane," and that each can is branded on the outside at the factory with a label which bears the following words and figures:

"5 POUNDS NET WEIGHT

MARY JANE
Reg. US Pat. Off.

MARY JANE
Is guaranteed by Corn Products Refining Co. to comply with the Food and Drugs Act, June 30, 1906. Registered under serial number 2317.

MARY JANE
A Table Syrup
Prepared From
Corn Syrup,
Molasses and
Pure Country Sorghum.
Contains Sulphur Dioxide

M'F'D BY
CORN PRODUCTS REFINING CO.
GENERAL OFFICES—NEW YORK, U. S. A."

That Mary Jane syrup is a proprietary food product, and is sold under the distinctive name of Mary Jane, which is not the name of any other article of food, and that it contains nothing deleterious or injurious to health; that plaintiff's representatives and agents solicit sales of Mary Jane in Kansas from wholesale merchants and forward the orders to Granite City, Ill., where the orders are subject to the approval of plaintiff, and that plaintiff has never carried a stock of said syrup in Kansas; and that the name "Mary Jane" is protected under the trademark laws of the United States.

It is further alleged that defendant Board of Health has enacted and published regulation 6, which is as follows:

"Regulation 6.

"C. (*b*) Manufacturers of proprietary foods are required to state upon the label the names and percentages of the materials used, so far as is necessary to secure freedom from adulteration and misbranding: (1) In the case of syrups, the principal label shall state definitely, in conspicuous letters, the percentage of each ingredient, in the case of compounds, mixtures, imitations, or blends. When the name of the syrup includes

the name of one or more of the ingredients, the preponderating ingredient shall be named first. . . ."

That sections 3 and 8 of the Kansas food and drugs law, which confer power on the Board of Health to make rules and regulations, are void because in contravention of the federal food and drugs act, and especially section 8 of that act; that section 3 and section 8, which confer power upon the Board of Health to make rules and regulations, and said regulation 6, are void because in conflict with the fourteenth amendment to the federal constitution, in that they require manufacturers of proprietary foods to disclose the formulæ by which they are compounded; that section 3 and section 8 of the Kansas law and regulation 6 are void because repugnant to section 8 of article 1 of the federal constitution, in that they constitute an interference with interstate commerce.

It is further alleged that defendants claim that said Mary Jane syrup is misbranded because the label does not contain the word "compound," and does not state the percentages of each ingredient of which the syrup is compounded; that said defendants have notified plaintiff's agents and representatives, and the wholesale and retail merchants in Kansas, that the product is misbranded, and that it is unlawful to sell it, and that defendants have threatened prosecution.

Defendants below *demurred* to this amended petition (trans. 13), which demurrer was overruled by the court. In passing upon this demurrer the trial court made a written "decision on questions of law" (trans. 14), in accordance with section 7178, General Statutes of Kansas, 1915, which section is as follows:

"Issues of law must be tried by the court or judge unless referred. The court or judge may in his discretion hear and pass upon any or all questions of law arising in the case, not raised by motion or demurrer, but appearing to be involved in the case under the allegations of the pleadings, as well as those raised by motion or demurrer, in advance of the trial of the facts, and the questions so decided and the rulings of the court thereon shall be stated in writing and filed as a part of the record in the case."

It is to be noted that this was a decision on questions of law only, was made before any testimony was introduced, and does

not purport to be and could not be findings of fact, and that no findings of fact were made by the court.

Defendants then *answered* (trans. 17), either denying or admitting specifically the allegations of the amended petition, and alleging that the product referred to has been commonly called Mary Jane Syrup, and is sometimes sold under the name of Mary Jane Sorghum; that the label is insufficient and misleading, in that it leads purchasers to believe that the syrup is composed of equal parts of corn syrup, molasses, and pure country sorghum; that the label is used for misleading wholesale and retail dealers and the public, and for leading them to believe that the syrup is composed of equal parts of corn syrup, molasses, and pure country sorghum; that the syrup is sold and billed to retailers as Mary Jane Sorghum; that sorghum is a more expensive product than corn syrup or molasses syrup; that there is only enough sorghum and molasses contained in Mary Jane Syrup to give it a color and make it look and appear like sorghum syrup, but that for other purposes the amount of sorghum contained in the compound is negligible, and so small as to add little if anything to the value of the syrup.

The trial court, after a trial without a jury, decided the issues in favor of plaintiff and enjoined the enforcement of regulation 6. Defendants appealed, and on that appeal the state supreme court reversed the decision of the trial court and directed that court to enter judgment for defendants (trans. 39). From this decision of the state supreme court the case comes here on writ of error.

As already pointed out, the trial court made no findings of fact. It is true that the journal entry of judgment contained a formal allegation that "all of the allegations of plaintiff's petition are true." But this does not purport to cover new issues raised by the answer and is a mere formal statement of what would necessarily follow judgment for plaintiff (§ 7197, Gen. Stat. 1915). The supreme court reversed this judgment with all of its incidents, and thereupon the general finding above referred to became a nullity. There are therefore no findings of fact.

The Law.

As the state and federal food and drug acts are very similar, and as one of the questions here is as to possible conflict between the two, they are stated together. The federal act

is found in 34 U. S. Statutes at Large, 771, and the state act is article 1, chapter 32, General Statutes of Kansas, 1915.

Section 1 of the state act forbids any person to manufacture *within the state of Kansas*, and section 2 forbids any person to sell, keep for sale, or offer for sale *within the state*, any article of food which is adulterated or misbranded.

Section 1 of the federal act makes it unlawful to manufacture *within any territory or the District of Columbia* any article of food which is adulterated or misbranded, and section 2 forbids the *introduction* into any state or territory or the District of Columbia from any other state or territory or the District of Columbia, or from any foreign country, of any article of food which is adulterated or misbranded.

Section 3 of the state act provides that "the State Board of Health is authorized and directed to make and publish uniform rules and regulations not in conflict with the laws of this state for carrying out the provisions of this act."

Section 3 of the federal act grants like powers to the Secretaries of the Treasury, Agriculture and Commerce and Labor.

Section 8 of the state act provides that, for the purposes of the act, food shall be considered misbranded—

"First, if it be *an imitation of or offered for sale under the distinctive name of another article.*

"Second, if it be labeled or branded so as to deceive or mislead the purchaser. . . .

"Fourth, if the package containing it, or its label, shall bear any statement, design or device regarding the ingredients or the substances contained therein, which statement, design or device shall be false or misleading in any particular.

"*Provided*, That an article of food which does not contain any added poisonous or deleterious ingredient shall not be deemed to be adulterated or misbranded in the following cases:

"First, In the case of mixtures or compounds which may be now, or from time to time hereafter, known as articles of food under their own distinctive names and *not an imitation of* or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with the *statement of the place where said article has been manufactured or produced;*

"Second, In the case of articles labeled, branded or tagged so as to plainly indicate that they are compounds, imitations or blends, and the *word compound, imitation or blend*, as the case may be, *is plainly stated on the package in which it is offered for sale.* . . .

"Provided, That nothing in this act shall be construed as re-

quiring or compelling proprietors or manufactures of proprietary foods which contain no unwholesome ingredients to disclose their trade formula, *except in so far as* the provisions of this act or the *rules and regulations of the State Board of Health may require to secure freedom from adulteration or misbranding.*"

Section 8 of the federal act is identical with the above except that in the the last proviso the words "no unwholesome added ingredient" are used instead of "no unwholesome ingredient," and that the federal law does not include the phrase "or the rules and regulations of the State Board of Health" which appear in the last three lines of the foregoing quotation.

The Facts.

It will be noted that the label which plaintiff is endeavoring to sustain in this action does not contain the words "compound." "imitation" or "blend," or any of them, does not purport to state the place where the article was manufactured or produced, and does not state the percentage of the ingredients contained in it.

The evidence shows that Mary Jane Syrup is manufactured at Granite City and Argo, Ill. (Trans. 20.) Plaintiff's western manager admitted that plaintiff's billing clerks had occasionally issued invoices of Mary Jane which described the article shipped as Mary Jane Sorghum. (Trans. 21, 33.)

At page 29 of the transcript appears an invoice issued by plaintiff company from its New York office, in which, in three items, the product is described as Mary Jane Sorghum.

At page 27 of the transcript is shown an invoice from the Green Grocery Company at Kansas City, in which the product is described as Mary Jane Sorghum, and upon which there is a note that a rebate of $1.10 has been allowed, which rebate was allowed by plaintiff company. (Trans. 25.)

At page 30 of the transcript is shown a price list sent out by plaintiff company, in which this product is described as Mary Jane Sorghum.

At page 24 of the transcript is shown a letter from Jett-Wood, wholesale grocers at Wichita, in which the product is described as Mary Jane Sorghum.

At page 28 of the transcript is shown an invoice from the Doland Mercantile Company of Atchison, in which the product is described as Mary Jane Sorghum, and at page 27 of

the transcript is set out the affidavit of Fred Gampper, to whom this invoice was rendered, in which he states that his order was entered by the salesman as for Mary Jane Sorghum.

At page 29 of the transcript is set out the affidavit of Betram Orde that he manufactured a syrup known as "Farmer Jones," which contained 45 percent of pure sorghum, and at page 30 of the transcript is shown the affidavit of James L. Tudhope that one of the salesman employed by the plaintiff company had stated to him that Mary Jane contained the same percentage of sorghum as Farmer Jones.

At page 31 of the transcript is shown an invoice from the Kansas City Wholesale Grocery Company, in which the product is described as Mary Jane Sorghum.

At page 31 of the transcript is set out the affidavit of Jerre Lasley, in which he states that he ordered from a salesman of the Glick Mercantile Company a case of Mary Jane Syrup, and that the salesman represented that Mary Jane was *sorghum*, and better than Farmer Jones Syrup.

Plaintiff's witnesses testified that Mary Jane contained 85 percent corn syrup, 10 percent molasses, and 5 percent sorghum. (Trans. 25.) Professor Bailey, of Kansas University, testified that 5 percent of sorghum would have no effect upon the compound, except to act as a flavor, and that it would add nothing to the nutritive value of the composition. (Trans. 32.)

At page 28 of the transcript is shown a label from a can found in Leavenworth, Kan., and at page 31 of the transcript is shown a label from a can found at Labette, Kan., both of which labels bear the words "sorghum flavored syrup," and also the words "corn syrup 85%, molasses 10%, sorghum 5%."

One of plaintiff's witnesses testified that plaintiff put the quantity of the ingredients contained in Mary Jane Syrup on the labels when it was for sale in Minnesota. (Trans. 26.) He also testified that such labels were not in general use in Kansas (trans. 32); and that plaintiff objected to putting the percentages on the labels in Kansas because the law did not require it, and that he distinguished between the rules of the Board of Health and the law itself in this respect. (Trans. 32.) He also testified that when plaintiff put out the Mary Jane mixture the trade knew that it was a mixture, and knew that plaintiff was a manufacturer of corn syrup, and that the trade knew that the

label was intended for the customer. (Trans. 32.) He also testified as follows:

Q. When you send out a price list calling it sorghum, and bill it to the retailer calling it sorghum, don't you expect the retailer to sell it to the customer calling it sorghum?

A. I don't think so. In addition I would say that was for a short period when that was billed out as sorghum, because I sent out instructions regarding our preparations.

Q. But since that time you sent out price lists calling it sorghum?

A. They would only go to the jobbers.

Q. Would n't they lead them to represent to the trade that that was sorghum?

A. As you have heard me say before, there is no straight sorghum in the market.

Q. But the customer does n't know it?

A. Therefore, we have to fall back on the label. That is the only way to give the customer real information. (Trans. 33.)

ARGUMENT.

Plaintiff is Entitled to No Relief.

It is clear that Mary Jane Syrup is an "imitation" of sorghum within the meaning of the first clause of section 8 of both the state and federal laws quoted above. The whole record shows that it is a sorghum-flavored syrup made to imitate sorghum. (Trans. 26, 30, 32, 33.)

Mary Jane Syrup was also sold as sorghum, and therefore "offered for sale under the distinctive name of another article" within the meaning of the same clause of these laws.

It is therefore clearly misbranded unless it can be brought within the exceptions or provisos contained in this section 8. These exceptions are:

First. In the case of mixtures or compounds known as articles of food under their own distinctive names, "and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced."

Second. In the case of articles branded so as to plainly indicate that they are compounds, imitations or blends, "and the word 'compound,' 'imitation' or 'blend,' *as the case may be,* is plainly stated on the packages."

As to the first exception, it is clear that Mary Jane Syrup does not come within its terms because it is an imitation of and offered for sale under the distinctive name of another article as above pointed out.

Moreover, in order to come within the terms of the exception under consideration, the label or brand must contain "a statement of the place where such article has been manufactured or produced." The testimony shows without conflict that this article is manufactured or produced at Argo and Granite City, Ill. These towns are nowhere mentioned on the label. The only location shown is "General Offices, New York, U. S. A." There is, therefore, an absolute failure to get the label within this exception.

Nor is it known as an article of food under its own distinctive name. It is true that there is testimony that it is, but

we submit that the record contradicts this conclusion, and such testimony is only a conclusion. By distinctive name we think is meant a name which itself indicates an article of food. Such a name is Crisco, which indicates a substitute for lard, or Grape-Nuts, which indicates a kind of a breakfast food. Such names, however, as Gold Medal Flour, or any other name which simply indicates that the product is some particular brand of a food already known by a distinctive name, are not distinctive names within the meaning of the statute. In other words, if the words "Mary Jane," without more, conveyed the idea of a syrup to be used for food, the words "Mary Jane" could constitute a distinctive name. But if, in order to convey the idea, it is necessary to say "Mary Jane Syrup," then the words "Mary Jane" are not the distinctive name of a food, but are simply the name of a brand of syrup.

In this case, as against the bare assertion of the conclusion of a witness that Mary Jane is a distinctive name, we find this product referred to as Mary Jane Syrup throughout the record. Mr. Hamlink, in the very affidavit in which he makes the assertion that Mary Jane is a distinctive name, calls it Mary Jane Syrup three times. The petition refers to Mary Jane Syrup thirty-four times. The letter of Jett & Wood refers to it as Mary Jane Sorghum, and the price list and invoice issued by plaintiff, and the four other invoices offered in evidence, refer to it as Mary Jane Sorghum.

It clearly, therefore, does not come within the first exception.

The second exception is in the case of articles labeled so as to plainly indicate that they are compounds, imitations or blends, and when the word "compound," "imitation" or "blend," as the case may be, is plainly stated on the package. There is absolutely no attempt whatever to bring the label within this exception, for none of the words "compound," "imitation" or "blend" appear upon the label.

The purpose of this requirement is to advise the purchaser whether he is getting one or another. There is nothing on the labels here to indicate whether this is a compound or a blend of glucose, cane syrup or pure country sorghum, nor to indicate that it is a mere imitation of sorghum or that the amount of sorghum contained is sufficient only for flavoring. The wrongful use of either of these words may amount to mis-

branding. Thus in *United States v. Ten Barrels of Vinegar*, 186 Fed. 399, the court said:

"The defendants contend that this restrictive proviso applies only where the blend is claimed without disclosure of ingredients, and has no application where, as here, the component parts of the blend are disclosed. This construction seems to be too narrow. One prime object of this legislation is to prevent the public from being misled or deceived. In view of the language of the act we are justified in saying that the term 'blend' as here displayed on the label, is an assurance to the public that the mixture consists of like substances; and in the present case it is an assurance that the 'Saratoga Brand Vinegar' consists of two like substances, that is, distilled vinegar and a vinegar derived from apple cider. In this regard the label is false and misleading.

"We have seen how naturally the buyer might be misled by a casual examination of the label. The use of the term 'blend' coupled with a specific reference to the pure food act, is well calculated to confirm such mistake, in view of the guaranty that the vinegar sold under this brand meets all the requirements of the national pure food law. Special significance is thus given to the statutory definition of the term 'blend.' It is true that boiled apple cider might be used as a harmless agent to give color or flavor to the distilled vinegar; but in such a case the boiled cider would be an infusion as distinguished from a 'blend,' and the public would be entitled to notice of its use for that qualified purpose. Here it is presented to the public as a blend, which is falsely misleading, because it is conceded that no cider vinegar whatever is contained in these packages."

The use of these words is therefore material. The label in question contains neither of them.

It seems clear, therefore, that the article is misbranded under both the state and the federal act.

The question then is: Can a manufacturer who has violated the federal food and drug act be heard to say that the state act is void because it conflicts with the federal act which he has violated? Or in other words, is the state powerless to protect itself against misbranded goods which are brought into the state in violation of the federal law? And is such a manufacturer entitled to equitable relief to protect misbranded products? We submit that the answer to all of these questions must be in the negative.

The general rule is familiar. In 22 Cyc. 776 it is said:

"The applicant for an injunction is governed by the usual equitable rules, and the relief will be denied him, even though he shows that he has a right and would otherwise be entitled to the remedy, in case he himself has acted dishonestly, fraudulently, or illegally. It is not enough to show that defendant is without right; the complainant who seeks equity must do equity and must affirmatively show himself to be equitably entitled to the relief asked."

The rule has especial application to trade-marks. In 38 Cyc. 700 it is said:

"If an alleged trade-mark involves any material untruth, misrepresentation, or bad faith, it will not be protected against infringement. To have this effect, it is not necessary that the misrepresentation be part of the trade-mark itself, or that it appear upon the face of the label. Misrepresentations in circulars and advertisements may be sufficient to bar relief, although relief has sometimes been afforded, notwithstanding such misrepresentations, upon the ground that they are less serious than when constituting part of the mark itself. The misrepresentation may consist in the use of the mark in an improper connection. Misuse of a trade-mark is a bar to relief, as where plaintiff himself uses it to deceive the public."

Moreover—

"The general rule that no person has any standing in any court as a suitor unless he alleges and shows that he has an actionable interest in the rights which he seeks to recover, or that he has suffered or will suffer an actionable injury by reason of the wrongs which he seeks to redress or prevent, applies with full force to persons seeking to raise constitutional questions in courts of justice. In order to maintain an action or suit they must establish that they have an actionable interest in the constitutional rights which they seek to protect. A court will not listen to an objection made to the constitutionality of an act by a party whose rights it does not affect and who has therefore no interest in defeating it; that is a legal interest in defeating it."

4 Enc. of U. S. Sup. Ct. Rep. 73.

In *New York v. Reardon*, 204 U. S. 152, 160, this court said:

"But there is a point beyond which this court does not consider arguments of this sort for the purpose of invalidating the tax laws of a state on constitutional grounds. This limit has been fixed in many cases. It is that unless the party setting up the unconstitutionality of the state law belongs to the

class for whose sake the constitutional protection is given, or the class primarily protected, this court does not listen to his objections, and will not go into imaginary cases, notwithstanding the seeming logic of the position that it must do so, because if, for any reason, or as against any class embraced, the law is unconstitutional, it is void as to all. *Albany county v. Stanley*, 105 U. S. 305, 311, 26 L. Ed. 1044, 1049; *Clark v. Kansas City*, 176 U. S. 114, 118, 44 L. Ed. 392, 396, 20 Sup. Ct. Rep. 284; *Lampasas v. Bell*, 180 U. S. 276, 283, 45 L. Ed. 527, 530, 531, 21 Sup. Ct. Rep. 368; *Cronin v. Adams*, 192 U. S. 108, 114, 48 L. Ed. 365, 368, 24 Sup. Ct. Rep. 219. If the law is valid when confined to the class of the party before the court, it may be more or less of a speculation to inquire what exceptions the state court may read into general words, or how far it may sustain an act that partially fails. With regard to taxes, especially, perhaps it might be assumed that the legislature meant them to be valid to whatever extent they could be sustained, or some other peculiar principle might be applied. See, *e. g.*, *People's Nat. Bank v. Marye*, 191 U. S. 272, 283, 48 L. Ed. 180, 186, 24 Sup. Ct. Rep. 68."

It is true that where Congress has covered the whole field of legislation relating to a particular phase of interstate commerce, its acts are supreme and any state law which conflicts therewith is void. A manufacturer who complies with such an act of Congress is protected against a state law. His argument is: The act of Congress interpreted in the light of the federal constitution tells me that when I have complied with the act the state may not interfere with me. But when he has violated the act of Congress he is not in a position to claim that a state law which conflicts with it is void and base his claim upon the proposition that as to one who has complied with the act of Congress the state law is void. So here, if plaintiff had branded its products as the federal act requires it would be in a position to make the claim (the soundness of which, however, we do not concede) that any statute of the state which made further requirements would be void. But when, as here, it has not complied with the act of Congress, and has not branded its product as required by that act, it will not be heard to make such a claim.

The purpose of both acts, in so far as they relate to adulteration, is to prevent the sale of injurious foodstuffs to the public, and in so far as they relate to misbranding, is to prevent fraud upon the public.

Thornton Pure Food and Drugs Act, sec. 84.

Hipolite Egg Co. v. U. S. 220 U. S. 45.

If the product in question here is misbranded, therefore, it stands convicted as a fraud upon the public, and as such it is not properly in the channels of interstate commerce and not protected against state legislation.

Plumley v. Mass. 155 U. S. 461.
Patapsco Co. v. Board, 171 U. S. 345.
Gibbons v. Ogden, 9 Wheat. 203.
U. S. v. Knight Co., 156 U. S. 1.
Missouri Railway Co. v. Haber, 169 U. S. 613.
License Cases, 5 How. 504.

In *Plumley v. Massachusetts*, *supra*, the court, at page 478, said:

"And yet it is supposed that the owners of a compound which has been put in a condition to cheat the public into believing that it is a particular article of food in daily use, and eagerly sought by people in every condition of life, are protected by the constitution in making a sale of it against the will of the state in which it is offered for sale, because of the circumstance that it is in an original package, and has become a subject of ordinary traffic. We are unwilling to accept this view. We are of opinion that it is within the power of a state to exclude from its markets any compound manufactured in another state, which has been artificially colored or adulterated so as to cause it to look like an article of food in general use, and the sale of which may, by reason of such coloration or adulteration, cheat the general public into purchasing that which they may not intend to buy. The constitution of the United States does not secure to any one the privilege of defrauding the public. The deception against which the statute of Massachusetts is aimed is an offense against society; and the states are as competent to protect their people against such offenses or wrongs as they are to protect them against crimes or wrongs of more serious character. And this protection may be given without violating any right secured by the national constitution and without infringing the authority of the general government. A state enactment forbidding the sale of deceitful imitations or articles of food in general use among the people does not abridge any privilege secured to citizens of the United States, nor, in any just sense, interfere with the freedom of commerce among the several states. It is legislation which 'can be most advantageously exercised by the states themselves.' *Gibbons v. Ogden*, 22 U. S., 9 Wheat. 203 (6:71)."

In *Patapsco Co. v. Board*, 171 U. S. 345, 358, the court said of the Plumley case, *supra*:

"It is true that an article of food was involved, but the sole ground of the decision was that the state had the power to

protect its citizens from being cheated in making their purchases, and that thereby the commercial power was not interfered with. *Schollenberger v. Pennsylvania*, 171 U. S. 1."

And the court further said (361):

"In any view, the effect on that commerce is indirect and incidental, and 'the constitution of the United States does not secure to any one the privilege of defrauding the public.'"

In the *License Cases*, 5 How. 504, at page 599, the court said:

"Whenever a thing, from character or condition, is of a description to be regulated by that power in the state, then the regulation may be made by the state, and Congress cannot interfere. But this must always depend on facts, subject to legal ascertainment, so that the injury may have redress. And the fact must find its support in this, whether the prohibited article belongs to, and is subject to be regulated as part of, foreign commerce, or of commerce among the states. If, from its nature, it does not belong to commerce, or if its condition, from putrescence or other cause, is such when it is about to enter the state that it no longer belongs to commerce, or in other words, is not a commercial article, then the state power may exclude its introduction. And as an incident to this power, a state may use means to ascertain the fact. And here is the limit between the sovereign power of the state and the federal power. That is to say, that which does not belong to commerce is within the jurisdiction of the police power of the state; and that which does belong to commerce is within the jurisdiction of the United States. And to this limit must all the general views come, as I suppose, that were suggested in the reasoning of this court in the cases of *Gibbons v. Ogden*, *Brown v. The State of Maryland*, and *New York v. Miln*."

In *U. S. v. Knight Co.*, 156 U. S. 1, the court said:

"That which belongs to commerce is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police power of the state. *Gibbons v. Ogden*, 22 U. S., 1 Wheat. 1, 210 (6:23, 73); *Brown v. Maryland*, 25 U. S., 12 Wheat. 419, 448 (6:678, 688); *Thurlow v. Massachusetts*, 46 U. S., 5 How. 599 (12:299); *Mobile County v. Kimball*, 102 U. S. 691 (26:238); *Bowman v. Chicago & N. W. R. Co.*, 125 U. S. 465 (31:700), 1 Inters. Com. Rep. 823; *Leisy v. Hardin*, 135 U. S. 100 (34:128), 3 Inters. Com. Rep. 36; *Wilkerson v. Rahrer* (*Re Rahrer*), 140 U. S. 455, 555 (35:572, 574)."

By section 2 of the federal food and drugs act the introduction into any state or territory from any other state or territory of misbranded food is prohibited. That is, misbranded food is excluded from interstate commerce and is not a proper article of interstate commerce. Under the authorities above cited, therefore, such misbranded articles are subject to the police power of the state.

Since the article in question here is misbranded it is subject to the police power of the state, and plaintiff, as its manufacturer, has no standing to enjoin the enforcement of the police regulations of the state. It is immaterial, so far as plaintiff is concerned, that the manufacturer of goods branded to satisfy the federal law might contest the police power of the state.

Neither the Kansas Statute Nor Regulation 6 Conflict with the Federal Food and Drugs Act.

The states may, of course, exercise their reserve police power unless such exercise be in conflict with and in effect nullify federal legislation. In the case at bar the federal law, by section 1, is made to apply only to the manufacture of food and drugs "within any territory or the District of Columbia," and by section 2 is made to apply only to "the introduction into any state or territory or the District of Columbia from any other state or territory or the District of Columbia, or from any foreign country."

The federal law, therefore, applies only to the manufacture in territories and the District of Columbia, and to transportation in interstate commerce. The state has no jurisdiction and has attempted to take no jurisdiction over these matters.

The state law applies to manufacture in the state and sale in the state, both of which are matters over which the federal government has no jurisdiction.

It is true that for purposes of inspection to ascertain whether or not adulterated or misbranded articles have been in channels of interstate commerce the federal law retains jurisdiction under section 10 of the act to seize property which has been in interstate commerce so long as it remains "unloaded, unsold or in original unbroken packages," but it may then be seized and condemned only because it has theretofore unlawfully been in

interstate commerce and not because it is unlawfully offered for sale in the state. In *McDermott v. Wisconsin*, 228 U. S. 115, at page 136, the court explained the purpose of this section 10 as follows:

"Congress, having made adulterated and misbranded articles contraband of interstate commerce, in the manner we have already pointed out, provides in § 10 of the act that such articles may be proceeded against and seized for confiscation and condemnation while being transported from one state, territory, district, or insular possession to another for sale, or, having been transported, remaining 'unloaded, unsold, or in original unbroken packages,' and the subsequent provisions of the section regulate the disposition of the articles seized. To make the provisions of the act effectual, Congress has provided not only for the seizure of the goods while being actually transported in interstate commerce, but has also provided for such seizure after such transportation and while the goods remain 'unloaded, unsold or in original unbroken packages.' The opportunity for inspection enroute may be very inadequate. The real opportunity of government inspection may only rise when, as in the present case, the goods as packed have been removed from the outside box in which they were shipped and remain, as the act provides, 'unsold.' It is enough, by the terms of the act, if the articles are unsold, whether in original packages or not. Bearing in mind the authority of Congress to make effectual regulations to keep impure or misbranded articles out of the channels of interstate commerce, we think the provisions of § 10 are clearly within its power. Indeed it seems evident that they are measures essential to the accomplishment of the purpose of the act."

When adulterated or misbranded goods are purchased by a local merchant and brought into Kansas from another state, and by him "sold, kept for sale or offered for sale," the federal government may seize them because they have unlawfully been in interstate commerce, and the state may seize them or prosecute the merchant because such adulterated or misbranded goods have unlawfully been sold or kept for sale within the state. This is the only point of contact between the two laws, and there is no conflict between the two. A merchant because he has successfully evaded the federal law is not thereby granted immunity to sell adulterated or misbranded goods in violation of the state law. The goods while still "in original, unbroken packages" might, after they were brought into the state putrefy and contain decomposed and putrid animal or

vegetable matter so as to be within section 7 of the state law. It certainly could not then be contended that they could be sold with impunity regardless of the state law, and that the state was powerless to protect the health of its citizens by forbidding the sale of the goods.

In *Missouri R. R. Co. v. Haber*, 169 U. S. 613, 627, the court said:

"Although the power of Congress to regulate commerce among the states, and the power of the states to regulate their purely domestic affairs, are distinct powers, which, in their application, may at times bear upon the same subject, no collision that would disturb the harmony of the national and state governments, or produce any conflict between the two governments in the exercise of their respective powers need occur, *unless the national government, acting within the limits of its constitutional authority, takes under its immediate control and exclusive supervision the entire subject to which the state legislation may refer.* 'The same bale of goods,' Mr. Justice Johnston well said in his concurring opinion in *Gibbons v. Ogden*, 'the same cask of provisions, or the same ship, that may be the subject of commercial regulation, may also be the vehicle of disease. And the health laws that require them to be stopped and ventilated are no more intended as regulations on commerce than the laws which permit their importation are intended to inoculate the community with disease. Their different purposes mark the distinction between the powers brought into action; and, while frankly exercised, they can produce no serious collision.' 22 U. S. 9 Wheat. 235. (6:79).

. . . . . .

"This court, while sustaining the power of Congress to regulate commerce among the states, has steadily adhered to the principle that the states possess, because they have never surrendered, the power to protect the public health, the public morals, and the public safety, by any legislation appropriate to that end which does not encroach upon rights guaranteed by the national constitution, nor come in conflict with acts of Congress passed in pursuance of that instrument. Although the powers of a state must in their exercise give way to a power exerted by Congress under that constitution, it has never been adjudged that that instrument by its own force gives any one the right to introduce into a state, against its will cattle so affected with disease that their presence in the state will be dangerous to domestic cattle."

The italics are our own.

In such a case it is not enough merely that the federal gov-

ernment has acted, but its action must, as stated in the foregoing quotation, take immediate control and exclusive supervision of the *entire* subject or the state statute must be in direct and positive conflict with the federal law. Thus in the case last cited the court said (p. 623):

"May not these statutory provisions stand without obstructing or embarrassing the execution of the act of Congress? This question must of course be determined with reference to the settled rule that a statute enacted in execution of a reserved power of the state is not to be regarded as inconsistent with an act of Congress passed in the execution of a clear power under the constitution, *unless the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or stand together. Sinnot v. Davenport*, 63 U. S. 22 How. 227, 243."

The italics are our own.

And again at page 635:

"These cases all proceed upon the ground that the regulation of the enjoyment of the relative rights, and the performance of the duties, of all persons within the jurisdiction of a state belongs primarily to such state under its reserved power to provide for the safety of all persons and property within its limits; and that even if the subject of such regulation be one that may be taken, under the exclusive control of Congress, and be reached by national legislation, any action taken by the state upon that subject that does not directly interfere with rights secured by the constitution of the United States *or by some valid act of Congress must be respected until Congress intervenes.*"

The italics are our own.

In *Savage v. Jones*, 225 U. S. 501, 533, the court said:

"When the question is whether a Federal act overrides a state law, the entire scheme of the statute must, of course, be considered, and that which needs must be implied is of no less force than that which is expressed. If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the state law must yield to the regulation of Congress within the sphere of its delegated power. *Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 425, 51 L. Ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; *Northern P. R. Co. v. Washington*, 222 U. S. 370, 378, *ante*, 237, 239, 32 Sup. Ct. Rep. 160; *Southern R. Co. v. Reid*, 222 U. S. 424, 436, *ante*, 257, 260, 32 Sup. Ct. Rep. 140.

"But the intent to supersede the exercise by the state of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress, fairly interpreted, *is in actual conflict with the law of the state.*"

In *McDermott v. Wisconsin*, 228 U. S. 115, 131, the court, referring to the federal food and drugs act, said:

"While these regulations are within the power of Congress, it by no means follows that the state is not permitted to make regulations, with a view to the protection of its people against fraud or imposition by impure food or drugs. This subject was fully considered by this court in *Savage v. Jones*, 225 U. S. 501, 56 L. Ed. 1182, 32 Sup. Ct. Rep. 715, in which the power of the state to make regulations concerning the same subject matter, reasonable in their terms, and not in conflict with the acts of Congress, was recognized and stated, and certain regulations of the state of Indiana were held not to be inconsistent with the food and drugs act of Congress."

It is clear, therefore, that in their general scope the state law and the federal law do not conflict and that both may stand and be enforced. It is contended, however, that regulation 6 of the Kansas State Board of Health, which requires the stating of the percentage of ingredients upon the label, conflicts with the federal law.

As we have already pointed out, this regulation was enacted under the exception to the fourth clause by that part of section 8 of the food and drugs act which relates to food, and which is in the state law, as follows:

"That nothing in this act shall be construed as requiring or compelling proprietors or manufacturers of proprietary foods which contain no unwholesome ingredients to disclose their trade formulæ except in so far as the provisions of this act *or the rules and regulations of the State Board of Health* may require to secure freedom from adulteration or misbranding."

This is the same language as that used in the federal act except that the italicized words shown above do not appear in the federal act. Section 3 of the state act authorizes and directs the State Board of Health to make uniform rules and regulations for carrying out the provisions of the act. It is not contended that regulation 6 discriminates against articles which have been in interstate commerce.

This delegation of authority to the State Board of Health is valid and constitutional under the state laws.

State v. Meyer, 94 Kan. 647.

Regulation 6 is as follows:

"Manufacturers of proprietary foods are required to state upon the label the names and percentages of the materials used so far as is necessary to secure freedom from adulteration and misbranding, and (1) in the case of syrups the principal label shall state definitely in conspicuous letters the percentage of each ingredient in the case of compounds, mixtures, imitations or blends. When the name of the syrup includes the name of one or more of the ingredients the preponderating ingredient shall be named first. . . ."

The state statute, therefore, provides that nothing in the act shall be construed to require a disclosure of trade formulæ except in so far as the rules and regulations of the State Board of Health may require to secure freedom from adulteration or misbranding. If this means anything it means that the State Board of Health may make requirements over and above those contained in the law, and if the board does make such requirements it must be assumed, in the absence of evidence to the contrary, that in the judgment of the board they were required to secure freedom from adulteration and misbranding.

In *Savage v. Jones*, 225 U. S. 501, it was held that a requirement of a state statute that stock food should be so labeled as to show the percentages of ingredients did not conflict with section 8 of the federal food and drugs act. It must follow, therefore, that this regulation does not conflict with the Kansas food and drugs act, and that it, therefore, was within the power of the State Board of Health.

It follows from the same authority that regulation 6 does not conflict with the federal food and drugs act. In the case just referred to, *Savage v. Jones*, 225 U. S. 501, the state statute required that there should be affixed to every package or sample of the ingredient covered a tag or label which should show, among other things, the guaranteed analysis, which should state the minimum percentage of crude fat and crude protein. It was contended that this act violated section 8 of the federal food and drug act. In that case the court said:

"It will be observed that in its enumeration of the acts which constitute a violation of the statute, Congress has not included the failure to disclose the ingredients of the article, save in

specific instances, where, for example, morphine, opium, cocaine, or other substances particularly mentioned, are present. It is provided that the article, 'for the purposes of this act,' shall be deemed to be misbranded if the package or label bear any statement, design or device regarding it or the ingredients or substances it contains, which shall be false or misleading. But this does not cover the entire ground. It is one thing to make a false or misleading statement regarding the article or its ingredients, and it may be quite another to give no information as to what the ingredients are. As is well known, products may be sold, and in case of so-called proprietary articles frequently are sold, under trade names which do not reveal the ingredients of the composition, and the proprietors refrain from revealing them. Moreover, in defining what shall be adulteration or misbranding for the purposes of the federal act, it is provided that mixtures or compounds known as articles of food under their own distinctive names, not taking or imitating the distinctive name of another article, which do not contain 'any added poisonous or deleterious ingredients,' shall not be deemed to be adulterated or misbranded if the name be accompanied on the same label or brand with a statement of the place of manufacture.

"Congress has thus limited the scope of its prohibitions. It has not included that at which the Indiana statute aims. Can it be said that Congress, nevertheless, has denied to the state, with respect to the feeding stuffs coming from another state and sold in the original packages, the power the state otherwise would have to prevent imposition upon the public by making a reasonable and nondiscriminatory provision for the disclosure of ingredients, and for inspection and analysis? If there be such denial it is not to be found in any express declaration to that effect. Undoubtedly Congress, by virtue of its paramount authority over interstate commerce, might have said that such goods should be free from the incidental effect of a state law enacted for these purposes. But it did not so declare. There is a proviso in the section defining misbranding for the purposes of the act, that 'nothing in this act shall be construed' as requiring manufacturers of proprietary foods which contain no unwholesome added ingredient to disclose their trade formulas, 'except in so far as the provisions of this act may require to secure freedom from adulteration or misbranding' (sec. 8). We have already noted the limitations of the provisions referred to. It is clear that this proviso merely relates to the interpretation of the requirements of the act, and does not enlarge its purview or establish a rule as to matters which lie outside its prohibitions.

"Is, then, a denial to the state of the exercise of its power for the purposes in question necessarily implied in the federal statute? For when the question is whether a federal act overrides

a state law, the entire scheme of the statute must, of course, be considered, and that which needs must be implied is of no less force than that which is expressed. If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the state law must yield to the regulatien of Congress within the sphere of its delegated power. *Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 51 L. Ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; *Northern P. R. Co. v. Washington*, 222 U. S. 370, 378, *ante*, 237, 239, 32 Sup. Ct. Rep. 160; *Southern R. Co. v. Reid*, 222 U. S. 424, 436, *ante*, 257, 260, 32 Sup. Ct. Rep. 140.

"But the intent to supersede the exercise by the state of its police power as to matters not covered by the federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress, fairly interpreted, is in actual conflict with the law of the state. This principle has had abundant illustration. *Chicago, M. & St. P. R. Co. v. Solan*, 169 U. S. 133, 42 L. Ed. 688, 18 Sup. Ct. Rep. 289; *Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 613, 42 L. Ed. 878, 18 Sup. Ct. Rep. 488; *Reid v. Colorado*, 187 U. S. 137, 47 L. Ed. 108, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 506; *Pennsylvania R. Co. v. Hughes*, 191 U. S. 477, 48 L. Ed. 268, 24 Sup. Ct. Rep. 132; *Crossman v. Lurman*, 192 U. S. 189, 48 L. Ed. 401, 24 Sup. Ct. Rep. 234; *Asbell v. Kansas*, 209 U. S. 251, 52 L. Ed. 778, 28 Sup. Ct. Rep. 485, 14 Ann. Cas. 1101; *Northern P. R. Co. v. Washington*, 222 U. S. 370, 379, *ante*, 237, 240, 32 Sup. Ct. Rep. 160; *Southern R. Co. v. Reid*, 222 U. S. 424, 442, *ante*, 257, 262, 32 Sup. Ct. Rep. 140."

The court then concludes:

"Applying these established principles to the present case, no ground appears for denying validity to the statute of Indiana. That state has determined that it is necessary, in order to secure proper protection from deception, that purchasers of the described feeding stuffs should be suitably informed of what they are buying, and has made reasonable provision for disclosure of ingredients by certificate and label, and for inspection and analysis. The requirements, the enforcement of which the bill seeks to enjoin, are not in any way in conflict with the provisions of the federal act. They may be sustained without impairing in the slightest degree its operation and effect. There is no question here of conflicting standards, or of opposition of state to federal authority. It follows that the complainant's bill in this aspect of the case was without equity."

This case has been repeatedly followed and approved. In *McDermott v. Wisconsin*, 228 U. S. 115, 131, the court said:

"While these regulations are within the power of Congress, it by no means follows that the state is not permitted to make regulations, with a view to the protection of its people against fraud or imposition by impure food or drugs. This subject was fully considered by this court in *Savage v. Jones*, 225 U. S. 501, 56 L. Ed. 1182, 32 Sup. Ct. Rep. 715, in which the power of the state to make regulations concerning the same subject matter, reasonable in their terms, and not in conflict with the acts of Congress, was recognized and stated, and certain regulations of the state of Indiana were held not to be inconsistent with the food and drugs act of Congress."

In *Atlantic Railroad Company v. Georgia*, 234 U. S. 280, the question was as to the validity of a state statute regarding headlights upon trains, including those engaged in interstate commerce. It was contended that this violated various acts of Congress regarding safety appliances and other matters. There the court said:

"The most that can be said is that inquiries have been made, but that Congress has not yet decided to establish regulations, either directly or through its subordinate body, as to the appliance in question. The intent to supersede the exercise of the state's police power with respect to this subject cannot be inferred from the restricted action which thus far has been taken. *Missouri P. R. Co. v. Larabee Flour Mills Co.*, 211 U. S. 612, 53 L. Ed. 352, 29 Sup. Ct. Rep. 214; *Savage v. Jones*, 225 U. S. 501, 533, 56 L. Ed. 1182, 1194, 32 Sup. Ct. Rep. 715."

In *Sligh v. Kirkwood*, 237 U. S. 52, the court had under consideration an act of the state of Florida making it unlawful to sell or ship any citrus fruit which was immature or otherwise unfit for consumption. It was contended that this state law conflicted with the federal food and drugs act, but the court held that it did not, saying:

"It is pointed out in the opinion of the supreme court of Florida, and we repeat here, that no act of Congress has been called to our attention undertaking to regulate shipments of this character which would be contravened by the act in question. As the Florida court says, the sixth subdivision of the food and drugs act, if citrus fruits should be held to be within the prohibitions against vegetable substances, includes only such as are in whole or in part filthy, decomposed or putrid. Green or immature fruit, equally deleterious to health, does not seem to be within the federal act. Therefore, until Congress

does legislate upon the subject, the state is free to enter the field. *Savage v. Jones*, 225 U. S. 501, 56 L. Ed. 1182, 32 Sup. Ct. Rep. 715."

In *Rast v. Van Demen & Lewis Co.*, 240 U. S. 342, the court had under consideration the trading-stamp law of the state of Florida. It was contended that this law conflicted with the act of Congress which made it unlawful to enclose in packages of tobacco or cigarettes any papers or certificates representing a share or interest in a lottery or to enclose any indecent or immoral picture. There the court said:

"Let it be granted that this provision permitted the inclosure in the package of tobacco of tokens of the character with which this case is concerned. It goes no farther, nor does it purport to go farther. It does not attempt to protect and enforce the permission to the retail sales of packages in the state. It might not legally have such effect if attempted; and such attempt will not lightly be inferred. *Savage v. Jones*, 225 U. S. 501, 56 L. Ed. 1182, 32 Sup. Ct. Rep. 715; *Standard Stock Food Co. v. Wright*, 225 U. S. 540, 56 L. Ed. 1197, 32 Sup. Ct. Rep. 784. This statute of Florida does not seek to control the interstate transportation of the packages; it controls only their sale in the state through the retail merchant, or, it may be, directly to the individual consumer for the purpose described, and in both cases for the ultimate redemption of the tokens delivered with the sale."

In *Hall v. Geiger-Jones Co.*, 242 U. S. 539, it was contended that the so-called blue-sky law of the state of Ohio was a burden upon interstate commerce. There the court said:

"The provisions of the law, it will be observed, apply to dispositions of securities *within* the state, and while information of those issued in other states and foreign countries is required to be filed, they are only affected by the requirement of a license of one who deals in them *within* the state. Upon their transportation into the state there is no impediment—no regulation of them or interference with them after they get there. There is the exaction only that he who disposes of them there shall be licensed to do so, and this only that they may not appear in false character and impose an appearance of a value which they may not possess; and this certainly is only an indirect burden upon them as objects of interstate commerce, if they may be regarded as such. It is a police regulation strictly, not affecting them until there is an attempt to make disposition of them within the state. To give them more immunity than this is to give them more immunity than more tangible articles are given, they having no exemption from regulations

the purpose of which is to prevent fraud or deception. Such regulations affect interstate commerce in them only incidentally."

See, also, *Missouri Railroad Co. v. Harris*, 234 U. S. 412; *Missouri Railroad Co., v. Larabee Mills Co.*, 211 U. S. 612; *Asbell* v. *Kansas*, 209 U. S. 251; *Reid v. Colorado*, 187 U. S. 137.

Congress, by enacting section 8 of the food and drugs act, has enacted that certain things shall constitute misbranding. It has not provided that the states may not make further requirements a failure to comply with which would constitute misbranding. It has said that nothing in the Food and Drugs Act shall be construed as requiring the disclosure of trade formulas, and by so saying has said that the law did not touch the question of trade formulas, and has thus left this particular field open for state legislation.

We submit, therefore, that regulation 6 does not conflict with the federal food and drugs act, and that it is in all respects valid.

The chief reliance of counsel for plaintiff in error is upon *McDermott v. Wisconsin*, 228 U. S. 115. In that case the state statute under consideration, after making certain requirements regarding labels, provided as follows:

"The mixture or syrups designated by this section *shall have no other designation or brand than herein required* that represents or is the name of any article which contains a saccharine substance."

The court, while sustaining the right of the states to pass food and drug acts, as shown by the quotation from the case contained herein, *supra*, held the act to be void for the reason that—

"To require the removal or destruction, before the goods are sold, of the evidence which Congress has by the food and drugs act, as we shall see, provided may be examined to determine the compliance or noncompliance with the regulations of the federal law, is beyond the power of the state. The Wisconsin act which permits the sale of articles subject to the regulations of interstate commerce only upon condition that they contain the exclusive labels required by the statute, is an act in excess of its legitimate power."

The statute under consideration here does not require the removal of the label which satisfies the federal act, and that decision is not, therefore, in point here.

Regulation 6 is Not Void Under the Fourteenth Amendment.

It is contended by counsel for plaintiff in error that regulation 6 in requiring the disclosure of formulæ deprives plaintiff of its property without due process of law and denies plaintiff the equal protection of the law. In this argument counsel go far beyond the actual requirements of the regulation. The regulation simply requires that the percentage of each ingredient be stated. It does not require that the method of mixing or the process of mixing be stated.

These percentages have, as is shown by the record, been voluntarily made public by plaintiff itself. Labels showing percentages taken from cans purchased in Kansas were introduced in evidence. (Trans. 28-31.)

The witness Congdon testified that he had seen syrup on sale purchased from a wholesaler at Topeka, Kan., which contained a statement of the ingredients. (Trans. 33.)

Plaintiff's chief witness, Waggoner, testified that labels showing percentages of ingredients had been used for three years in Minnesota. (Trans. 32.)

It is difficult to see, therefore, how it can be held that plaintiff is deprived of property by being compelled to make public a formula which it already has made public. Regardless of this, however, there is no deprivation of property without due process of law in this requirement.

Standard Stock Food Co. v. Wright, 225 U. S. 540.
State v. Snow, 81 Iowa, 642.
Savage v. Jones, 225 U. S. 501.

Respectfully submitted.

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CORN PRODUCTS REFINING COMPANY *v.* EDDY ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 119. Argued January 14, 1919.—Decided April 14, 1919.

A state regulation respecting the labeling of syrup compounds, which does not discriminate against the manufacturer or his product or against syrups as a class, *held*, not objectionable under the equal protection clause. P. 431.

The right of a manufacturer to maintain secrecy as to his compounds and processes is subject to the right of the State, in the exercise of its police power, to require that the nature of the product be fairly set forth. P. 432. *Held:* That a state regulation, requiring manufacturers of proprietary compound syrups to state definitely in conspicuous letters on the principal label the percentage of each ingredient, is consistent with the due process clause of the Fourteenth Amendment. *Id.*

It is the effect of a regulation as put in force by the State that determines whether it directly burdens interstate commerce, and not its characterization, or its construction by the state court. *Id.*

The proviso in § 8 of the Federal Pure Food Act, that nothing in the act shall be construed as requiring proprietors or manufacturers of proprietary foods which contain no unwholesome added ingredient

to disclose their trade formulas, except in so far as the provisions of the act may require to secure freedom from adulteration or misbranding, merely relates to the interpretation of the requirements of that act, and does not enlarge its purview or establish a rule as to matters which lie outside its prohibitions. P. 439.

A regulation adopted by a state board of health, and in effect upheld by the state court as authorized by the state pure food law, must be regarded as state legislation in ascertaining its relation to the federal food law. P. 437.

Neither under the commerce clause directly nor through the Federal Pure Food Law, as amended, is a State forbidden to require that proprietary foods, imported into the State and sold in the original packages, shall bear labels stating the names and percentages of the ingredients composing them. P. 433. *Savage* v. *Jones*, 225 U. S. 501, followed; *McDermott* v. *Wisconsin*, 228 U. S. 115, distinguished.

99 Kansas, 63, affirmed.

THE case is stated in the opinion.

Mr. T. M. Lillard, with whom *Mr. R. W. Blair* and *Mr. C. A. Magaw* were on the brief, for plaintiff in error.

Mr. J. L. Hunt, Assistant Attorney General of the State of Kansas, with whom *Mr. S. M. Brewster*, Attorney General of the State of Kansas, and *Mr. S. N. Hawkes*, Assistant Attorney General of the State of Kansas, were on the brief, for defendants in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

Plaintiff in error (plaintiff in the original action) is a corporation which manufactures in the State of Illinois a proprietary table syrup composed of 85 per cent. corn syrup or glucose, 10 per cent. molasses, and 5 per cent. sorghum, and sells it under the name of "Mary Jane" in cans labeled as follows:

"5 Pounds Net Weight.
Mary Jane.
Reg. U. S. Pat. Off.

Mary Jane is guaranteed by Corn Products Refining Co. to comply with the Food and Drugs Act, June 30, 1906. Registered under serial number 2317.

Mary Jane. A Table Syrup Prepared from Corn Syrup, Molasses and Pure Country Sorghum. Contains Sulphur Dioxide.

M'f'd by Corn Products Refining Co.
General Offices—New York, U. S. A."

Prior to the beginning of the action plaintiff had agents and representatives employed in soliciting orders for this syrup from wholesale merchants in the State of Kansas, the orders being filled by shipping the required quantity of the syrup in interstate commerce in the original sealed cans with original labels attached. Defendants, who are the members of the State Board of Health of Kansas, deeming "Mary Jane" to be misbranded in several particulars within the meaning of the Food and Drugs Law of that State (c. 266, Kans. Sess. Laws, 1907, as amended by c. 184, Laws 1909; embodied in c. 35, Kans. Gen. Stats. 1909; c. 32, Kans. Gen. Stats. 1915), and regulations adopted by the Board under authority of that law, notified plaintiff's agents and representatives and other persons selling and dealing in "Mary Jane" syrup that unless plaintiff complied with Regulation 6 of the State Board by attaching in a conspicuous place on the outside of each can sold or offered for sale within the State a label with the word "compound" printed upon it, and stating definitely the percentage of each ingredient of which the syrup was composed, they would be arrested and prosecuted. Similar warnings were communicated to wholesale and retail dealers who were and long had been selling this syrup in Kansas under the original brand and label.

Plaintiff brought an equitable action against the members of the board of health in one of the district courts of the State; setting up the pertinent facts, alleging that defendants were acting under the authority of the state

law and certain regulations adopted by them pursuant to it, and among others Regulation 6, requiring that in the case of syrups the principal label should state definitely the percentage of each ingredient, in the case of compounds, mixtures, imitations, or blends; plaintiff further averring that the state law and the regulations referred to, particularly Regulation 6, were void because in conflict with the interstate commerce clause (Art. I, § 8) of the Constitution of the United States and the Act of Congress of June 30, 1906, c. 3915, 34 Stat. 768, and also in conflict with the provisions of § 1 of the Fourteenth Amendment; and that defendants were interfering with plaintiff's interstate commerce and with its lawful business in the State of Kansas, thereby threatening plaintiff with great and irreparable damage; and praying for an injunction.

Their general demurrer having been overruled, defendants answered and the case came on for hearing, with the result that the district court made a finding "that all of the allegations of plaintiff's petition are true"; and adjudged that there should be a perpetual injunction restraining defendants from interfering with the sale of "Mary Jane" in the State of Kansas upon the ground that it was misbranded when sold under the label above referred to, and in particular from interfering, because of Regulation 6, with persons dealing in or selling the syrup, so branded, within the State.

Upon appeal, the Supreme Court of Kansas reversed the judgment with direction that the district court enter judgment for the defendants (99 Kansas, 63); and the case comes here on writ of error under § 237, Judicial Code, as amended September 6, 1916, c. 448, 39 Stat. 726, upon the contention that the Kansas statute and the regulations adopted by the state board pursuant to it, as interpreted and applied by the state court of last resort, are repugnant to the interstate commerce clause of the Constitution of the United States (Art. I, § 8) and to the due process

and equal protection provisions of the Fourteenth Amendment, and especially are in conflict with the Federal Food and Drugs Act.

Upon the argument here, the attack was centered upon the effect of Regulation 6, which, so far as pertinent, reads as follows: "Manufacturers of proprietary foods are required to state upon the label the names and percentages of the materials used, so far as is necessary to secure freedom from adulteration and misbranding: (1) In the case of syrups, the principal label shall state definitely, in conspicuous letters, the percentage of each ingredient, in the case of compounds, mixtures, imitations, or blends. When the name of the syrup includes the name of one or more of the ingredients, the preponderating ingredient shall be named first."

It will be convenient to deal first with the contention made under the Fourteenth Amendment. It is not seriously insisted that there is a denial of the equal protection of the laws, and we see no ground for such a contention. There is no discrimination against plaintiff in error or its product, or against syrups as a class.

It is, however, urged that since plaintiff's syrup is a proprietary food, made under a secret formula and sold under its own distinctive name, and since it contains no deleterious or injurious ingredients, the effect of the reglation in requiring plaintiff to disclose upon the label the ingredients and their proportions amounts to a taking of its property without due process of law. Evidently the purpose of the requirement is to secure freedom from adulteration and misbranding; the mischief of misbranding being that purchasers may be misled with respect to the wholesomeness or food value of the compound. And it is too plain for argument that a manufacturer or vendor has no constitutional right to sell goods without giving to the purchaser fair information of what it is that is being sold. The right of a manufacturer to maintain

secrecy as to his compounds and processes must be held subject to the right of the State, in the exercise of its police power and in promotion of fair dealing, to require that the nature of the product be fairly set forth. *Heath & Milligan Co.* v. *Worst*, 207 U. S. 338, 353; *Savage* v. *Jones*, 225 U. S. 501, 524; *Standard Stock Food Co.* v. *Wright*, 225 U. S. 540, 548-549; *Schmidinger* v. *Chicago*, 226 U. S. 578, 588; *Armour & Co.* v. *North Dakota*, 240 U. S. 510, 514, 515; *Hutchinson Ice Cream Co.* v. Iowa, 242 U. S. 153, 159; *Hebe Co.* v. *Shaw*, 248 U. S. 297, 303.

We turn to the questions raised under the commerce clause and the act of Congress.

Although the Supreme Court in its opinion said nothing about interstate commerce, it cannot be doubted, in the state of the record, that defendants' activities against which relief was sought included incidental interference with plaintiff's interstate commerce in the "Mary Jane" syrup; and that the general judgment in favor of defendants amounts to an adjudication that the state law and regulations are to be enforced with respect to plaintiff's product indiscriminately, not only when sold and offered for sale in domestic commerce but also while in the hands of the importing dealers for sale in the original packages and hence, in contemplation of law, still in the course of commerce from State to State. The silence of the Supreme Court upon the subject cannot change the result in this regard. In cases of this kind, we are concerned not with the characterization or construction of the state law by the state court, nor even with the question whether it has in terms been construed, but solely with the effect and operation of the law as put in force by the State. *St. Louis Southwestern Ry. Co.* v. *Arkansas*, 235 U. S. 350, 362; *Kansas City &c. Ry. Co.* v. *Kansas*, 240 U. S. 227, 231; *Mountain Timber Co.* v. *Washington*, 243 U. S. 219, 237; *Crew Levick Co.* v. *Pennsylvania*, 245 U. S. 292, 294.

The question of repugnancy to the commerce clause may be treated (a) aside from federal legislation; and (b) in view of the "Food and Drugs Act" of Congress, June 30, 1906, c. 3915, 34 Stat. 768.

Upon this question, in both aspects, the judgment under review is clearly sustained by the decision of this court in *Savage* v. *Jones*, 225 U. S. 501, which is precisely in point. That case raised a question whether a statute of Indiana relating to concentrated commercial feeding stuffs for animals (Acts 1907, c. 206), which required the packages, when sold or offered for sale, to bear in a conspicuous place a tag or label having plainly printed on it in the English language (among other things) a guaranteed analysis stating the minimum of crude fat and crude protein, determined by a prescribed method, and the ingredients from which the concentrated commercial feeding stuff was compounded, as applied to sales of complainant's products in original packages by importing purchasers, constituted an unwarranted interference with interstate commerce, either independently of or in the light of the Food and Drugs Act of Congress. The court finding (p. 524) that the evident purpose of the Indiana statute was to prevent fraud and imposition in the sale of food for domestic animals; that its requirements were directed to that end and were not unreasonable; and that it was not aimed at interstate commerce, but without discrimination sought to promote fair dealing in the described articles of food; held (p. 528) that the statute was a lawful exercise of the police power of the State, including the required disclosure of the ingredients contained in feeding stuffs offered for sale in that State and the provision for their inspection and analysis. Upon the question whether there was any conflict with the act of Congress, after pointing out (p. 529) that the object of the latter act was to prevent adulteration and misbranding by prohibiting the introduction into any State from another

State of articles of food or drugs adulterated or misbranded within the meaning of the act, and that included in the definition of the term "food" were "all articles used for food, drink, confectionery, or condiment by man or other animals, whether simple, mixed, or compound"; and (p. 531) that in the enumeration of the acts constituting a violation of the statute Congress had not included (as the Indiana statute did include) a failure to disclose the ingredients of the article, save in specific instances where morphine, opium, cocaine, or other substances particularly mentioned were present; and after reciting the provision of the federal act that an article "for the purposes of this Act" shall be deemed misbranded if the package or label bear any statement, design or device regarding it or the ingredients or substances it contains, which shall be false or misleading; the court proceeded to say (p. 532): "But this does not cover the entire ground. It is one thing to make a false or misleading statement regarding the article or its ingredients, and it may be quite another to give no information as to what the ingredients are. As is well known, products may be sold, and in case of so-called proprietary articles frequently are sold, under trade names which do not reveal the ingredients of the composition and the proprietors refrain from revealing them. Moreover, in defining what shall be adulteration or misbranding for the purposes of the Federal act, it is provided that mixtures or compounds known as articles of food under their own distinctive names, not taking or imitating the distinctive name of another article, which do not contain 'any added poisonous or deleterious ingredients' shall not be deemed to be adulterated or misbranded if the name be accompanied on the same label or brand with a statement of the place of manufacture (§ 8). Congress has thus limited the scope of its prohibitions. It has not included that at which the Indiana statute aims. Can it be said that Congress, nevertheless,

has denied to the State, with respect to the feeding stuffs coming from another State and sold in the original packages, the power the State otherwise would have to prevent imposition upon the public by making a reasonable and non-discriminatory provision for the disclosure of ingredients, and for inspection and analysis? If there be such denial it is not to be found in any express declaration to that effect. Undoubtedly Congress, by virtue of its paramount authority over interstate commerce, might have said that such goods should be free from the incidental effect of a state law enacted for these purposes. But it did not so declare. There is a proviso in the section defining misbranding for the purposes of the act that 'nothing in this Act shall be construed' as requiring manufacturers of proprietary foods which contain no unwholesome added ingredient to disclose their trade formulas 'except in so far as the provisions of this Act may require to secure freedom from adulteration or misbranding' (§ 8). We have already noted the limitations of the provisions referred to. And it is clear that this proviso merely relates to the interpretation of the requirements of the act, and does not enlarge its purview or establish a rule as to matters which lie outside its prohibitions. Is, then, a denial to the State of the exercise of its power for the purposes in question necessarily implied in the Federal statute? For when the question is whether a Federal act overrides a state law, the entire scheme of the statute must of course be considered and that which needs must be implied is of no less force than that which is expressed. If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the state law must yield to the regulation of Congress within the sphere of its delegated power. [Citing cases.] But the intent to supersede the exercise by the State of its police power as to matters not covered by the Federal legislation

is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the State. This principle has had abundant illustration." And, after citing many previous decisions of this court, and analyzing several of them, the opinion proceeds (p. 539): "Applying these established principles to the present case, no ground appears for denying validity to the statute of Indiana. That State has determined that it is necessary in order to secure proper protection from deception that purchasers of the described feeding stuffs should be suitably informed of what they are buying and has made reasonable provision for disclosure of ingredients by certificate and label, and for inspection and analysis. The requirements, the enforcement of which the bill seeks to enjoin, are not in any way in conflict with the provisions of the Federal act. They may be sustained without impairing in the slightest degree its operation and effect. There is no question here of conflicting standards, or of opposition of state to Federal authority. It follows that the complainant's bill in this aspect of the case was without equity."

An attempt is made to distinguish *Savage* v. *Jones*, upon the ground that the Indiana statute there under consideration covered a field of regulation which had not been included in the federal statute, whereas, it is said, the Kansas Food and Drugs Law is almost literally a reproduction of the federal law upon the same subject. It is true that the Kansas statute, *mutatis mutandis*, follows quite closely the lines of the act of Congress, and that its 8th section, which defines the term "misbranded" is almost a copy of the corresponding section of the federal act; but in the following proviso at the close of the section the words italicized have been inserted by the state legislature, they not appearing in the federal act: "And pro-

vided further, that nothing in this act shall be construed as requiring or compelling proprietors or manufacturers of proprietary foods, which contain no unwholesome ingredients, to disclose their trade formulas, except in so far as the provisions of this act, *or the rules and regulations of the State Board of Health*, may require to secure freedom from adulteration or misbranding." These italicized words make a very substantial difference. Section 3 of the Kansas act provides that "The State Board of Health is authorized and directed to make and publish uniform rules and regulations, not in conflict with the laws of this state, for carrying out the provisions of this act;" and under this authority Regulation 6 was adopted and published, which requires manufacturers of certain proprietary foods, including syrups that are compounds, mixtures, or blends, to state definitely upon the principal label the percentage of each ingredient. It is insisted that the regulation goes beyond the authority conferred upon the state board because it is inconsistent with the definition of "misbranding" contained in the act, and therefore cannot be deemed to be a regulation required to secure freedom from misbranding. Upon this particular point the opinion of the Kansas Supreme Court is silent; but the decision of the district court upon the demurrer sustained the validity of the regulation as being within the authority of the board; the Supreme Court did not overrule this; the question is one of state law; and we must assume that the regulation, having been adopted by the board and in effect sustained by the decision of the Supreme Court, is within the authorization of the statute. This being so, it must be treated as an enactment proceeding from the legislative power of the State; and hence it stands upon precisely the same basis as the requirement of the Indiana statute (quoted in 225 U. S. 504, and referred to above) that commercial feeding stuffs should bear a label showing among other things a guaranteed analysis stating the

minimum percentage of crude fat and crude protein and the ingredients from which the article was compounded. It was because of the absence from the federal act of a provision requiring the ingredients to be disclosed that this court held that Congress had limited the scope of its prohibitions and had not included that at which the Indiana statute aimed.

The Food and Drugs Act of Congress has not been changed in any material respect from the form it bore when *Savage* v. *Jones* arose. By Acts of August 23, 1912, c. 352, 37 Stat. 416, and March 3, 1913, c. 117, 37 Stat. 732, § 8 has been amended, but not in any manner that affects the present question.

The fact that the Kansas statute *mutatis mutandis* follows quite closely the federal act, and that § 8 defines the term "misbranded" almost in the very words of the corresponding section of the act of Congress, with the significant difference in the final proviso to which we have called attention, is not dispositive of the question whether Congress has covered the field to the exclusion of state regulation. This is to be determined by what the act of Congress omits, not by what it contains; and by considering whether, in words or by necessary implication, Congress has prohibited the States from making any regulation in respect of the omitted matter. Further argument upon the question is foreclosed by the decision in *Savage* v. *Jones* that an omission from the act of Congress of a provision requiring feeding stuffs transported in interstate commerce to give affirmative information as to the ingredients of the article amounted to a limitation by Congress of the scope of its prohibitions, and that, although not including that at which the Indiana statute aimed, Congress had not denied to the State, with respect to feeding stuffs coming from another State and sold in original packages, the power to prevent imposition upon the public by making a reasonable and non-discriminatory

provision for the disclosure of ingredients and for inspection and analysis.

That decision is conclusive also upon this point: that the proviso in § 8 of the federal act that "nothing in this Act shall be construed as requiring or compelling proprietors or manufacturers of proprietary foods which contain no unwholesome added ingredient to disclose their trade formulas, except in so far as the provisions of this Act may require to secure freedom from adulteration or misbranding," merely relates to the interpretation of the requirements of the federal act, and does not enlarge its purview or establish a rule as to matters which lie outside its prohibitions.

Savage v. *Jones* was decided after elaborate argument and upon full consideration. We see no reason to reconsider the conclusion there reached or to deny to the case its proper authority. Its doctrine was followed and applied in *Sligh* v. *Kirkwood*, 237 U. S. 52, 61-62; *Hebe Co.* v. *Shaw*, 248 U. S. 297, 304.

It is argued that the present case is controlled rather by *McDermott* v. *Wisconsin*, 228 U. S. 115, 130, and in effect that this case must be taken as overruling *Savage* v. *Jones*. The contention is unfounded. The authority of the earlier decision was expressly recognized in the opinion of the court in the later; the distinction being placed (pp. 131-132) upon the question whether the regulations of the State concerning the same subject-matter were in conflict with the acts of Congress. The Wisconsin statute was held to be in conflict because it required that packages of food stuffs received through the channels of interstate commerce, bearing labels intended to be in compliance with the act of Congress, while the goods were still unsold and were in the possession of the importer for the purpose of sale and being exposed and offered for sale by him, as a condition of their legitimate sale within the State, should bear the label required by the state law and none other—

in effect requiring the label that showed compliance with the act of Congress to be removed from the package before the first sale by the importer, and while the goods remained still subject to federal inspection.

The judgment under review should be

Affirmed.